

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 6269 of 2022
Date of filing complaint: 21.09.2022
Date of decision: 24.08.2023

Manav Deep Singh

R/o: - M-63, DLF Park Tower, DLF Park Place, Golf
Course Road, Gurugram - 122002

Complainant

Versus

M/s Ireo Pvt. Ltd.

Regd. Office: IREO Campus, Archview Drive, Ireo City,
Golf Course Extension Road, Gurugram-122101
(Haryana)

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Sanjeev Sharma (Advocate)

Shri M.K. Dang (Advocate)

Complainant
Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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

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2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, 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
9.	Unit no.	FF-04, 1 st Floor (Page no. 25 of the complaint)
10.	Unit area admeasuring (super area)	707.27 sq. ft. (Page no. 25 of the complaint)
11.	Approval of building plans	05.09.2013 (Annexure R26, at page no. 60 of reply)
12.	Date of execution of Buyer's Agreement	20.09.2013 (Page no. 18 of the complaint)
13.	Environmental Clearance	12.12.2013 (Annexure R27, at page no. 66 of reply)
14.	Consent to establish from pollution angle	07.02.2014 (Annexure R28, at page 77 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.1,64,55,684/- (As per SOA on page no. 181 of reply)
18.	Amount paid by the complainants	Rs.1,45,43,155/- (As per SOA on page no. 181 of reply)
19.	Occupation certificate /Completion certificate	28.08.2019 (Page no. 83 of the reply)
20.	Offer of Possession	17.09.2019 (Page no. 179 of the reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That upon the representation by the respondent and advertisement done in said behalf, the respondent was to construct a Commercial Complex namely "**IREO City Central**" on parcel of land measuring 3.9375 acres located at Sector-59, Gurgaon, Haryana.

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- II. That the complainant is the original allottee/purchaser wherein the complainant showed the interest in purchasing a commercial unit with the respondent upon which the allotment letter dated 11.06.2013 was issued in favour of the complainant & Sh. Jasbir Singh and thereafter, the buyer's agreement dated 20.09.2013 was executed between the complainant along with his father, Sh. Jasbir Singh and respondent wherein unit no. FF04, on First Floor, admeasuring 707.27 sq. ft. in the project "**IREO City Central**" along with one parking after the application for allotment dated 18.07.2012 made by the complainant to the respondent.
- III. That the total sale consideration for the commercial shop was Rs.1,47,65,332/-. As per clause 13.3 talks about handing possession within 42 months from the date of approval of building plans, since the said fact is unknown, the date of possession is calculated from the date of the buyer's agreement which comes out to be 20.03.2017.
- IV. That the complainants have made a total payment of Rs.1,45,43,155/- between July 2012 to December 2016 as and when demanded by the respondent without any delay. Further, that the name of Sh. Jasbir Singh was deleted from the name of allottees for the said unit in question vide letter dated 20.06.2016 as acknowledged by the respondent itself.
- V. That despite making the payment of the aforementioned amount, the possession of the unit in question was offered on 17.09.2019 wherein the size of the commercial unit was reduced to 692.81 sq. ft. and based upon the statement of account dated 17.09.2019, the refundable amount accrues to Rs.19,12,529/-.
- VI. That the complainants seek indulgence of the authority in grant of possession of the commercial unit along with delay possession charges by the respondent and the refundable amount of Rs.19,12,529/-.

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C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- Direct the respondent to handover the possession of the allotted unit along with delayed possession interest at the prescribed rate.
 - Direct the respondent to refund of excess amount of Rs.19,12,529/-.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds: -
- 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 along with his co-allottee (Mr. Jasbir Singh) and the respondent prior to the enactment of the Act of 2016, and the provisions laid down in the said Act cannot be applied retrospectively.
 - 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 i.e., clause 33 of the buyer's agreement.
 - That the complainant has not approached this 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:

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- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in providing best services to its customers. The respondent and its associate companies have developed and delivered several prestigious projects such as 'Grand Arch', 'Victory Valley', 'Skyon' and 'Uptown' etc. and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That the complainant along with his co-allottee, after checking the veracity of the project namely 'Ireo City Central' Sector 59, Gurugram had applied for allotment of a commercial unit vide booking application form dated 18.07.2012. Based on the said application, the respondent vide its provisional allotment letter dated 11.06.2013 allotted to the complainant and his co-allottee unit no. ICC-R-FF-04 having tentative super area of 707.27 sq. ft. for a sale consideration of Rs.1,47,65,332. As per the terms of the allotment offer letter, it was intimated that the buyer's agreement was to be executed by the complainants and that the terms and conditions of the agreement would be final and binding. Moreover, the complainant and his co-allottee were aware from the very inception that the super area of the commercial unit allotted to the complainant and his co-allottee was tentative and was subject to the

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change as per statutory requirements. Moreover, the sale consideration as stated was exclusive of the registration charges, stamp duty, service tax and other charges payable by the complainant and his co-allottee to the respondent and the same was known to the complainant and his co-allottee.

- That accordingly, the buyer's agreement was executed between the parties on 20.09.2013. The complainant and his co-allottee agreed to be bound by the terms stipulated in the buyer's agreement. The complainant and his co-allottee had booked the unit with the respondent when the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.
- That as per the agreed terms payment was to be made according to construction link payment plan. The respondent raised payment demands from the complainant and his co-allottee in accordance with the agreed terms and conditions of the allotment as well as of the payment plan. Payment demand dated 03.07.2013, the respondent had raised the second installment for the net payable amount of Rs.21,41,450.55/-. However, the complainant and his co-allottee made part-payment only after three reminders dated 29.07.2013, 19.08.2013 and 09.09.2013 were sent by the respondent to the complainant and his co-allottee and the balance amount was adjusted in the next installment demand as arrears.

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- That vide payment demand dated 05.03.2014, the respondent had sent third installment demand for the net payable amount of Rs.31,53,041/-. However, the complainant and his co-allottee made part-payment only after two reminders dated 31.03.2014 and 24.04.2014 were sent by the respondent to the complainant and his co-allottee and the balance amount was adjusted in the next installment demand as arrears.
- That vide letter dated 05.04.2016 sent by Mr. Jasbir Singh (co-allottee of the said unit in question) to the respondent, his name was deleted from the name of allottees of the said unit in question.
- That vide payment demand dated 24.08.2016, the respondent had sent seventh installment demand for the net payable amount of Rs.14,45,164.80/-. However, he made the payment only after two reminders dated 19.09.2016 and 12.10.2016 were sent by the respondent to the complainant. Further, vide payment demand dated 25.11.2016, the respondent raised a demand of Rs.65,569/- towards Value Added Tax ("VAT"). However, the complainant failed to made payment and the amount was adjusted in the next installment demand as arrears.
- That the possession of the unit/shop was to be offered to the complainant in accordance with the terms and conditions of the Buyer's Agreement. It is submitted that Clause 13.3 of the Buyer's Agreement states that the '*.....the Company proposes to offer the possession of the said unit to the allottee within a period of 42 months*

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from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 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 is pertinent to mention here that 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. There has been no delay on the part of respondent who has throughout acted in accordance with the provisions laid down by law and in accordance with the rules and regulations. 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

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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 respondent. Therefore, 60 months from 07.02.2014 (including the 180 days grace period), expired on 07.02.2019.

- That the complainant is trying to mislead this authority by making baseless, false and frivolous averments. The respondent, despite failure of the complainant in adhering to his obligations of making timely payment and non-completion of the documentation formalities, has already completed the construction of the unit allotted to the complainant. The respondent had applied for the grant of occupation certificate on 04.05.2017 and the same was granted by the concerned authorities on 28.08.2019.
- iv. That although the respondent has offered the possession of the unit, the implementation of the said project was hampered due to non-payment of instalments by the allottee on time and also due to the events and conditions which were beyond the control of the respondent, and which 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:
- **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

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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 be deemed to be extended for 6 months on account of the above.

- **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

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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.

- **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.
- **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.
- v. That after receiving the occupation certificate dated 28.08.2019, the respondent immediately called upon the complainant to take over the possession of the unit after making payment of the amount due and also to complete the documentation formalities vide notice of possession dated 18.09.2019. However, the complainant miserably failed to do so. The complainant who is the Director of M/s Jaygee Hospitality Services Pvt. Ltd. was the channel partner of the respondent company. The only

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aim of the complainant is to somehow blackmail and pressurize the respondent despite the respondent having already fulfilled its obligation by offering possession of the shop way back in 2019.

- vi. That despite the respondent having offered the possession way back on 18.09.2019 to the complainant, he has miserably failed to come forward to take the possession of the unit and to comply with the requisite formalities. The respondent was constrained to send reminders dated 24.10.2019 and 04.01.2021 calling upon the complainant to take over the possession of the unit after paying the amount due. Despite the reminders sent by the respondent, the complainant has still not come forward to comply with requisite formalities and has rather filed the present totally false, baseless and frivolous complaint with totally malafide motives wrongly claiming refund as well as delayed possession charges. The complainant is very well aware that the notice of possession as well as reminders sent to the complainant take into account the minor change in the super area of the unit as it was tentative at the time of allotment. Therefore, the final demand raised by the respondent is after taking into consideration the change in area. No amount whatsoever is payable by the respondent to the complainant and the complainant is very well aware that he is not entitled for the same.
- vii. That from the facts and circumstances, it is clear that the respondent has already fulfilled its obligations and offered the possession of the unit, but it is complainant who has miserably failed to comply with the



obligations. The complainant cannot be allowed to take undue advantage of his wrong doings. The complainant cannot be given premium of not coming forward to take the possession of the unit in question by allowing the present totally misconceived complaint. Rather, the complainant who is breach of the agreed terms and conditions of the builder buyer's agreement is liable to pay holding charges as well as interest for delay in making payment to the respondent. In the interest of justice, a direction is required to be given by this authority to the complainant to pay the amount due along with accrued interest, holding charges etc. in terms of the builder buyer's agreement to the respondent and to take over the possession of the shop in question.

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

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within

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the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

10. 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) The promoter shall-

(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.

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

F. Findings on the objections raised by the respondent:

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

12. 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

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enactment of the Act and the provision of the said Act cannot be applied retrospectively.

13. 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

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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."

14. 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."

15. 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-

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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.

16. 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".

17. 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

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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

18. 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

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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 complainant:

G. I Direct the respondent to handover the possession of the allotted unit along with delayed possession interest at the prescribed rate.

G. II Direct the respondent to refund of excess amount of Rs.19,12,529/-

19. In the present complaint, the complainant 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."

20. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 20.09.2013, 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."

21. 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 favored the promoters/developers or gave them

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the benefit of doubt because of the total absence of clarity over the matter.

22. 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.
23. 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.
24. 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 preconditions, 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

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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.

25. **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

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conditions including demonetization and the order dated 07.04.2015 passed by the Hon'ble NGT including others.

26. **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.
27. **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent/promoter 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."*
28. 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 allottee. 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.

29. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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:

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Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public

30. 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.
31. Taking the case from another angle, the complainant/allottee was entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 20% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved persons, 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 home buyers. The authority 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 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 are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These type of discriminatory terms and conditions of the buyer's agreement would not be final and binding.

32. 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.
33. The definition of term 'interest' as defined under section 2(z a) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. — For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

34. 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.
35. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 20.09.2013, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan i.e., 05.09.2013 plus 180 days grace period after expiry of the said committed period to allow for unforeseen delay beyond the control of the company. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 05.03.2017. Occupation certificate was granted by the concerned authority on 28.08.2019 and thereafter, the possession of the subject flat was offered to the complainant on 17.09.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 20.09.2013 to hand over the possession within the stipulated period.

36. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 28.08.2019. The respondent offered the possession of the unit in question to the complainant only on 17.09.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer of possession (17.09.2019) which comes out to be 17.11.2019.
37. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e., 10.75 % p.a. w.e.f. 05.03.2017 till the expiry of 2 months from the date of offer of possession (17.09.2019)

which comes out to be 17.11.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

38. Also, the amount of Rs.2,04,739/- (as per statement of account dated 17.09.2019) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

G. Directions of the authority

39. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate i.e., 10.75% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 05.03.2017 till 17.11.2019 i.e., expiry of 2 months from the date of offer of possession (17.09.2019). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of Rs.2,04,739/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

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- iii. The rate of interest chargeable from the allottee by the promoter, 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.
- iv. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within 30 days and the respondent shall handover the possession in next 30 days to the complainant/allottee and to get the conveyance deed of the allotted unit executed in the favour of complainant in term of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.
- v. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
40. Complaint stands disposed of.
41. File be consigned to registry.

Dated: 24.08.2023


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