

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

Complaint no. : 1524 of 2022
Order Reserve On : 06.07.2023
Order Pronounce On: 14.09.2023

Shikha Hora Kamdar

R/o: Flat no. 3102/Tower 5, 31st Floor,
Crescent Bay Building, Jerbia Wadia Road, Bhoiwada,
Parel, Mumbai -400012

Complainant

Versus

M/s Ireo Grace Realtech Private Limited

Office at: - C-4, 1st Floor, Malviya Nagar, New Delhi,
South Delhi-110017

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Aakshi Lodha (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 28 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 thereunder 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. No.	Heads	Information
1.	Project name and location	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Licensed area	37.5125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid upto 20.02.2021
	Licensee	M/s Precision Realtors Pvt. Ltd. and 5 others.
5.	RERA registered/not registered	Registered Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
6.	Unit no.	804,8 th Floor, C-11 Tower (Page no. 51 of the complaint)
7.	Unit measuring	1295.78 sq. ft. (Page no. 51 of the complaint)
8.	Date of approval of building plan	23.07.2013 (Annexure R5 on page no. 56 of reply)
9.	Date of allotment	12.08.2013 (Annexure R-2 on page no. 50 of reply)

10.	Date of environment clearance	12.12.2013 (Annexure R-6 on page no. 64 of reply)
11.	Date of execution of builder buyer's agreement	10.07.2014 (Page no. 48 of the complaint)
12.	Date of fire scheme approval	27.11.2014 (Annexure R-8 on page no. 76 of reply)
13.	Due date of delivery of possession	23.01.2017 (Calculated from the date of approval of building plans) Note: Grace Period is not allowed.
14.	Possession clause	13. 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 default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the 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 building plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for

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		unforeseen delays beyond the reasonable control of the Company
15.	Termination notice	03.10.2018 (Page no. 107 of the complaint)
16.	Total consideration	Rs.1,36,32,299/- [As per payment plan on page no. 43 of complaint]
17.	Total amount paid by the complainant	Rs 1,34,30,236/- [As per statement of account on page no. 169 of complaint]
18.	Occupation certificate	27.01.2022 (Annexure R-11 on page no. 81 of reply)
19.	Offer of possession	16.02.2022 (Annexure R-12 on page no. 84 of reply)

B. Facts of the complaint

3. The complainant has made the following submission: -

- I. That on 25.03.2013 complainant submitted an application form along with a sum of Rs. 12,50,000/- to the respondent for booking an apartment. Further, within 45 days of the booking on 09.05.2013 complainant paid a further sum of Rs. 13,81,368/-.
- II. That on 12.08.2013 respondent issued an allotment letter to the complainant and allotted a said unit.
- III. That on 10.07.2014, the developer and the complainant executed the apartment buyer's agreement in respect of the apartment bearing no. 804, 8th floor, C-11 tower, having a super area of 1295.78 sq. ft.
- IV. That as per clause 3, it was agreed that the complainant would pay basic sale price of Rs.1,27,63,433/- along with all the charges in the

manner set out in the payment plan and out of that amount she has paid an amount of Rs.1,34,72,791/- between 25.03.2013 to 02.05.2018.

- V. That despite payment of a sum of Rs. 1,34,72,791 by the complainant to the developer since 25.03.2013, there was no intimation by the developer to indicate any possibility of handover of the possession of the apartment to the complainant within the commitment period and grace period provided in the agreement.
- VI. That as a result, on 03.10.2018, the complainant sent an email to the developer terminating the agreement stating that the apartment was booked in March 2013, and as even after 5.5 years, the possession was not given by the developer, the complainant wants the refund of the amounts paid by her along with interest.
- VII. That further, on 22.11.2018, 04.02.2019, 25.04.2021, 09.05.2021, 20.06.2021, 08.10.2021 and 26.07.2021 respectively the complainant again sent an email to the developer to confirm the amount to be refunded to her and the timeline for the same as the complainant failed to handover the possession within the agreed date.
- VIII. That the developer is liable to refund the entire amount paid by the complainant along with interest at the rate of MCLR + 2% from the date of each payment till the date of refund, to the complainant under section 18 of the Act.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- Direct the respondent to pay the interest at the prescribed rate from the due date of possession till the date of actual possession. (An application for amendment of relief sought seeking delayed possession charges instead of refund)



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 has contested the complaint on the following grounds: -
- i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
 - ii. 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 35 of the buyer's agreement.
 - iii. That the complainant, after checking the veracity of the project namely, 'Corridor; sector 67A, Gurugram had applied for allotment of an apartment vide his booking application form dated 25.03.2013.
 - iv. That based on the said application, respondent vide its allotment offer letter dated 12.08.2013 allotted to the complainant apartment no. CD-C11-08-804 having tentative super area of 1295.78 square feet for a sale consideration of Rs. 1,36,32,699.23/-. The respondent had sent the copies of the agreement to the complainant vide letter dated 18.03.2014. The agreement in question was executed on 10.07.2014 only after reminder dated 28.05.2014 was sent by the respondent.



- v. That the respondent made payment demands from the complainant in accordance with the agreed terms and conditions of the complainant as well as no illegality has been committed by it in doing so.
- vi. That the possession of the unit is supposed to be offered to the complainant in accordance with the agreed terms and conditions of the booking application form and the agreement in question. It is submitted that vide clause 43 of schedule 1 of the booking application form and clause 13.3 of the apartment buyer's agreement, 'subject to force majeure as defined herein and further subject to the applicant having complied with all its obligations under the terms and conditions of the agreement and the applicant not having defaulted under any provisions of the agreement including but not limited to timely payment of total sale consideration, stamp duty and other charges and also subject to the applicant 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 building plans and/or fulfillment of the pre-conditions imposed thereunder (commitment period) the allottee further agrees and understands that the company shall be additionally entitled to a grace period of 180 days'. Furthermore, the complainant had further agreed for an extended delay period of 12 months from the date of expiry of grace period as per clause 44 of schedule 1 of the buyer's agreement and clause 13.5 of the apartment buyer's agreement.
- vii. That from the aforesaid terms of the booking application form and the apartment buyer's agreement, it is evident that the time was to be computed from the date of receipt of all the requisite approvals. Even otherwise construction cannot be raised in the absence of necessary

approvals. It is pertinent to mention here that it has been specified in sub clause (iv) of clause 17 of the building plan dated 23.7.2013 that the clearance issued by the Ministry of Forest and Environment, Government of India had to be obtained before starting of the construction of the project. that the environment clearance for the construction of the project was granted on 12.12.2013. Furthermore, in clause 39 of part A of the environment clearance dated 12.12.2013, it was stated that fire safety plan was to be duly approved by the fire department before the start of any construction work at the spot. As per clause 35 of the environment clearance certificate dated 12.12.2013, the project was to obtain permission of Mines & Geology Department for excavation of soil before the start of construction. The requisite permission from the Department of Mines & Geology Department has been obtained on 04.03.2014. Furthermore, it was stated in clause 39 of part A of the environment clearance that fire safety plan was the necessity before the start of any construction work at the site. The last of the statutory approvals, i.e., the fire scheme approval was granted by the concerned authorities on 27.11.2014 and the time period for offering the possession according to the agreed terms of the agreement would be expired only on 27.11.2019. However as stated above, the due date was subject to force majeure conditions and the complainant complying with his contractual obligations.

- viii. That the complainant is trying to mislead this authority by making baseless, false and frivolous averments. The respondent has already completed the construction of the tower in which the unit of the complainant is located, and the respondent has already applied for the grant of occupation certificate on 10.09.2019. The concerned authorities after scrutiny of the documents granted the occupation

certificate for the tower in question on 27.01.2022 and the respondents have already offered the possession of the unit to the complainant on 16.02.2022.

- ix. That pursuant to the grant of occupation certificate for phase I, notice of possession to the respective allottees was issued and possession has been handed over to approx. 275 allottees and conveyance deed of approx. 119 apartments in favour of respective allottees has been executed and registered. The respondent applied for grant of occupation certificate to the DGTCP for approx. 658 apartments of phase-II vide application dated 10.09.2019 and the same was subsequently granted on dated 27.01.2022 and notice of possession was given on 16.02.2022 including the complainant herein. Despite completion of the project way back in 2019, the occupation certificate of corridors- phase-II could only be issued on 27.01.2022 by the DTCP, Haryana due to filing of false and frivolous complaints from time to time. The aforesaid allottees have on various dates (18.06.2019, 29.06.2019, 04.07.2019, 05.07.2019 and 18.10.2019) filed written complaints before the DTCP, Haryana so as to obstruct the grant of occupation certificate. It is stated that the said complaints were filed with totally malafide motives so that the allottees are not obligated to take possession of the apartments allotted to them and to gain undue advantage over the developer/respondent.
- x. That the DTCP, Haryana after repeated requests passed a detailed and reasoned order on 25.09.2020 on the complaints of the allottees in favour of the respondent thereby rejecting the plea of the allottees for cancellation of occupation certificate.
- xi. There were various other reasons for delay in handing of the project such as 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 other force majeure events/conditions which were beyond the control of the respondents 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: The respondents 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 8th 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, 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.
- 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

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weather in November every year. Thus, 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 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 respondents and the said period is also required to be added for calculating the delivery date of possession.
- Non-Payment of Instalments by Allottees: Several other allottees 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.
- That, furthermore, outbreak of Covid-19 and its various subsequent waves adversely affected the functioning of various Govt. as well as private offices and has caused delay in grant of occupation certificate of phase-II of the project in which unit of the complainant is situated. This Hon'ble Authority has also taken the suo moto cognizance of the covid-19 pandemic and has declared 6 months period starting from 25.03.2020 as force majeure period. The Hon'ble Apex Court and Hon'ble Punjab and Haryana High Court have also taken suo moto

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cognizance of the situation due to various waves of Covid-19 and have granted relief in terms of extension of limitation w.e.f. 15.03.2020 to 28.02.2022. Accordingly, this period w.e.f. 15.03.2020 to 28.02.2022 should be counted under force majeure since respondent after completion of the construction of the project has applied for grant of occupation certificate on 10.09.2019 and any delay in grant of occupation certificate either due to various false and frivolous complaints filed by various defaulting allottees or due to non-functioning of the offices of the competent authority due to Covid-19 pandemic cannot be attributed to the respondent.

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 submission made by the parties.
8. That on 06.07.2023, the counsel for the respondent prayed that the due date for handing over of possession was 27.11.2018 and the OC of the project was received on 27.01.2022. Thereafter the offer was also made on 16.02.2022. The unit is ready for possession and if the complainant wishes to continue with the project, the respondent is ready to handover the unit and is willing for the adjustment of DPC. However, the counsel of the complainant stated that due to inordinate delay in handing over of possession, the complainant wants refund of the paid-up amount. After seeking necessary instructions from the complainant/allottee, on 17.07.2023 the complainant filed an application for amendment of complaint and is now seeking DPC for delay in handing over the possession.
9. Thereafter, the complainant filed an application for amendment of the relief sought on 17.07.2023 and seeking delayed possession charges for delay in handing over of possession and the same was heard on 10.08.2023. Further,

the respondent stated that settlement talks are going on between the parties regarding adjustment of DPC.

E. Jurisdiction of the authority

10. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

11. 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

12. 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.

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

F. Findings on the objections raised by the respondent.

F.1 Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

14. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the 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.
15. The authority is of the view 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. 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The 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 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."

16. Further, 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."

17. 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

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

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

18. 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.
19. 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.

Handwritten signature/initials

20. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant 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 and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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

21. The Hon'ble Delhi High Court in 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

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excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

22. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 23.01.2017. 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. Findings regarding relief sought by the complainant

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

23. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs.1,36,32,699/- out of which it has made payment of Rs.1,34,30,236/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 12.08.2013. The apartment buyer agreement was executed between the parties on 10.07.2014 after a lapse of almost one year. The complainant intends to continue with the project and is 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."

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24. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 10.07.2014, provides for handing over possession and the same is reproduced below:

13.3

Schedule for possession of the said unit

"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 fulfilment 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."

25. 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 residential, 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.

26. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession.

27. 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.

28. The counsel for the respondent promoter argued that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 27.11.2014, as it is the last of the statutory approvals which forms a part of the preconditions. The authority is of the view that the respondent has not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondent has acted in a pre-determined and preordained manner.

29. On a bare reading of the clause 13.3 of the agreement, it becomes apparently clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the 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 apartment. According to the established principles of law and the principles

of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainant.

30. By virtue of apartment buyer's agreement executed between the parties on 10.07.2014, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (23.07.2013) which comes out to be 23.01.2017 along with grace period of 180 days which is not allowed in the present case.
31. On 23.07.2013, the building plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned plan stipulated that an NOC/ clearance from the fire authority shall be submitted within 90 days from the of issuance of the sanctioned building plans. Also, under section 15(2) and (3) of the Haryana Fire Service Act, 2009, it is the duty of the authority to grant a provisional NOC within a period of 60 days from the date submission of the application. The delay/failure of the authority to grant a provisional NOC cannot be attributed to the developers. But here the sanction building plans stipulated that the NOC for fire safety (provisional) was required to be obtained

within a period of 90 days from the date of approval of the building plans, which expired on 23.10.2013. It is pertinent to mention here that the developers applied for the provisional fire approval on 24.10.2013 (as contented by the respondents herein the matter of Civil Appeal no. 5785 of 2019 titled as '**IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.**') after the expiry of the mandatory 90 days period got over. The application filed was deficient and casual and did not provide the requisite documents. The respondents submitted the corrected sets of drawings as per the NBC-2005 fire scheme only on 13.10.2014, which reflected the laxity of the developers in obtaining the fire NOC. The approval of the fire safety scheme took more than 16 months from the date of the building plan approval i.e., from 23.07.2013 to 27.11.2014. The builders failed to give any explanation for the inordinate delay in obtaining the fire NOC.

32. In view of the above, the authority taken a view that the complainant /allottee should not bear the burden of mistakes /laxity or the irresponsible behaviour of the developers/respondents and seeing the fact that the developers/respondents did not even apply for the fire NOC within the mentioned time frame of 90 days. It is a well settled law that no one can take benefit out of his own wrong. In light of the above-mentioned facts the respondents/ promoters should not be allowed to take benefit out of his own mistake just because of a clause mentioned i.e., fulfilment of the preconditions even when they did not even apply for the same in the mentioned time frame. In view of the above-mentioned reasoning the

authority has started to calculate the due date of possession from the date of approval of building plans.

33. **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 23.01.2017. 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.

34. **Demonetization:** However, 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.

35. **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."

36. 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. Therefore, in the present case, the respondent promoters have 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.

37. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

38. 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.

39. 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 14.09.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% per annum.
40. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

41. Therefore, interest on the delay payments from the complainant 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.

42. 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 10.07.2014, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (23.07.2013) which comes out to be 23.01.2017. The grace period of 180 days is not allowed in the present complaint for the reasons mentioned above. Therefore, the due date of handing over possession comes out to be 23.01.2017. Occupation certificate was granted by the concerned authority on 27.01.2022 and thereafter, the possession of the subject flat was offered to the complainant on 16.02.2022. 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 10.07.2014 to hand over the possession within the stipulated period.

43. 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 27.01.2022. The respondent offered the possession of the unit in question to the complainant only on 16.02.2022, 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

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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 (16.02.2022) which comes out to be 16.04.2022.

44. 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. 23.01.2017 till the expiry of 2 months from the date of offer of possession (16.02.2022) which comes out to be 16.04.2022 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

H. Directions of the authority: -

45. 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 promoter as per the functions entrusted to the authority under sec 34(f) of the Act: -

- 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., 23.01.2017 till expiry of 2 months from the date of offer of possession (16.02.2022) i.e., upto 16.04.2022 only. 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. 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.
 - iii. The respondent is directed to supply a copy of the updated statement of account after adjusting the delayed possession charges.
 - iv. The complainant is directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 30 days from the receipt of updated statement of account.
 - v. The respondent is directed to handover the possession of the unit on payment of outstanding dues if any, within 30 days to the complainant /allottee and to get the conveyance deed of the allotted unit executed in his favour in terms of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.
 - vi. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

46. Complaint stands disposed of.

47. File be consigned to the registry.

Dated: 14.09.2023

V.I. - 3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram