BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4752 of 2020
Order Reserve On : 18.01.2024
Order Pronounce On: 18.04.2024

1. Mr. Anish Mukker
2. Mrs. Trupti Mukker

Both RR/o: Villa No. 179, Tatvam Villas, Sohna Road, Gurugram. **Complainants**

Versus

M/s Ireo Victory Valley Private Limited
Registered Office at: - 305, 3rd floor, Kanchan House, Karampura, Commercial Complex, New Delhi- 110015
Corporate office at: - 5th Floor, Orchid Center, Golf Course Road, Sector-53, Gurugram. **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Krishna Saroff (Advocate) Complainants
Shri M.K Dang (Advocate) Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottees as per the apartment buyer's agreement executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Project name and location	"Ireo Victory Valley" at Golf Couse Road, Sector 67, Gurgaon, Haryana.
2.	Licensed area	24.6125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	277 of 2007 dated 26.10.2007 valid up to 25.10.2017
5.	Name of licensee	M/s KSS Properties Private Limited.
6.	RERA registered/not registered	Not Registered
7.	Unit no.	B3504, 34th Floor, Tower-B (Page no. 35 of the complaint)
8.	Unit area admeasuring (super area)	4325 sq. ft. (Page no. 35 of the complaint)
9.	Increase in super area	4748 sq. ft. (Page no. 61 & 62 of the complaint)
10.	Date of approval of building plan	29.11.2010 (Annexure R-16 on page no. 90 of reply)
11.	Date of environment clearance	25.11.2010 (Annexure R-17 on page no. 96 of reply)
12.	Date of allotment	20.09.2012 (Annexure C-2 on page no. 27 of Complaint)
13.	Date of execution of builder buyer's agreement	26.12.2012 (Annexure C-5 on page no. 32 of the complaint)
14.	Date of fire scheme approval	28.10.2013 (Annexure R-18 on page no. 103 of reply)

15.	Possession clause	**13.3 Possession** *"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 being in default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, 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 36 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 unforeseen delays beyond the reasonable control of the Company."* **(Emphasis supplied)**
16.	Due date of delivery of possession	**29.11.2013** (Calculated from the date of approval of building plans) Note: Grace Period is not allowed.
17.	Total sale consideration	Rs.4,20,39,519/- [As per SOA dated 31.10.2019 on page no. 60 of complaint]
18.	Amount paid by the complainants	Rs.4,12,82,599/- [As per SOA dated 31.10.2019 on page no. 60 of complaint]
19.	Occupation certificate	28.09.2017 (Annexure R-20 on page no. 107 of reply
20.	Offer of possession	16.07.2021 (Annexure R-21 on page no. 109 of reply)

B. Facts of the complaint:

3. The complainants have made the following submission: -

I. That in the year 2012 the respondent through its marketing executives and advertisements through various modes approached the complainants with an offer to sell residential flats of different sizes along with numerous facilities in the proposed residential project named as "The IREO Victory Valley" in sector-67, Gurugram. On believing the representation made by the executive of the respondent, the complainants agreed and submitted an application form along with a sum of Rs.48,57,550/- vide three cheques to the respondent for booking of a duplex apartment having a super buildup area of 4325 sq. ft. along with 3 parking slot in the said project.

II. That on 20.09.2012 respondent issued an allotment letter to the complainants and allotted a duplex apartment bearing no. VV-B-35-04 on 34th floor in tower-B, having a super area of 4325 sq. ft. in the said project. Thereafter, on 26.12.2012, the developer and the complainants executed the apartment buyer's agreement and opted the construction linked payment plan in respect of the said unit.

III. That as per clause 3 of the apartment buyer's agreement, it was agreed that the complainants would pay basic sale price of Rs.4,02,22,500/- along with all the charges in the manner set out in the payment plan and out of that amount they had paid an amount of Rs.4,12,82,599/- between 31.08.2012 to till 12.02.2015.

IV. That despite payment of a sum of Rs.4,12,82,599/- by the complainants to the respondent, the respondent not only failed to handover the possession of the said unit since last 8 years but also failed to offer the possession to the complainants. That as per clause 13.3 of the agreement,

the possession of the apartment was to be offered within a period of 36 months from the date of approval of the building plan. The sanction for construction of the buildings was granted on 29.11.2010 by DTCP, Haryana. That the occupancy certificate was obtained by the builder on 28.09.2017 that is almost after a delay of 4 years from the date of stipulated in the buyer's agreement.

V. That on 06.02.2020 the complainants were informed by the respondent for the first time through mail regarding the increase in super build up area of the said unit from 4325 sq. ft. to 4748 sq. ft.

VI. That the respondent had issued statement of account on 31.10.2019, whereby the respondent levied the aggregating charges of Rs.40,36,206/- under the heads of labour cess, service tax, VAT, CGST/SGST, non-refundable club deposit, replacement fund maintenance security, infra-augmentation charges & Interest on delayed payment. That the respondent failed to provide the copies of challans or details pertaining to assessment orders to ascertain the correctness of the claim made by it on account of service tax and VAT.

VII. That the respondent has charged more than Rs.5 lakhs on account of "replacement fund maintenance security", "infra-augmentation charges", "applicable carrying cost" and others which are vague in nature and have failed to provide any satisfactory explanation for the same.

VIII. That as per the agreement the respondent has charged EDC @ Rs.326.97/- per sq. ft. whereas the rate of EDC applicable in the year 2012 was @ Rs.308/- per sq. ft., also the respondent never refunded nor adjusted the same.

IX. That on 17.09.2020, the complainants caused a notice to be issued through its advocate claiming refund of the amount paid by them along

with interest and compensation, despite the receipt of said notice, the respondent never replied to the said notice nor refunded the amount.

C. Relief sought by the complainants:

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

   i. Direct the respondent to handover the possession of the unit being duplex apartment bearing no. VV-B-35-04 on 34th floor, Tower-B, having super area of 4325 sq. ft. complete in all respect.

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

   iii. Direct the respondent to pay the differential amount of circle rate payable in 2014 and the amount to be paid at the time of execution of sale deed of the said unit in question to the complainants. (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 buyer's agreement was executed between the parties prior to the enactment of the Act of 2016, and the provisions laid down in the said Act cannot be applied retrospectively.

   ii. That this Authority does not have the jurisdiction to try and decide the present false and frivolous complaint. The project in question is exempted from registration under the Act of 2016 and the Rules of 2017. The tower of the project where the unit of the complainants is situated

does not come under the scope and ambit of 'on-going project' as defined in section 2(o) of the Rules, 2017.

That application for grant of Occupation Certificate for the block where the unit of the complainants is situated in the Project was made before the publication of the Rules, 2017 vide its application dated 09.02.2017 in accordance with sub code 4.10 of the Haryana Building Code, 2017. Thus, according to the provisions of the said Act and Rules, the tower where the unit of the complainants is located is not required to be registered under the said Act and Rules. The project is not covered within the ambit of the provisions of Real Estate Regulation and Development Act, 2016.

iii. That the complaint is not maintainable as the matter is referable to arbitration as per the Arbitration and Conciliation Act, 1996 in view of the fact that buyer's agreement, contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 36 of the buyer's agreement.

iv. That the complainants have not approached this Authority with clean hands and have intentionally suppressed and concealed the material facts. The conduct of the complainants has been malafide and they are not entitled to any relief at all. The correct facts are as under: -

a. That the complainants, after checking the veracity of the project namely, "The IREO Victory Valley", sector-67, Gurugram had applied for allotment of an apartment vide his booking application form dated 17.09.2012. That based on the said application, respondent vide its allotment offer letter dated 20.09.2012 allotted to the complainants a duplex apartment no. VV-B-35-04, 34th floor, tower-B, having super area of 4325 square feet for a sale consideration of Rs.4,20,39,519/-.

b. That based on the said Application, the respondent vide its allotment offer letter dated 20.09.2012 allotted to the complainant's apartment no. B3504, Tower no. B, having tentative super area of 4325 sq. ft. Accordingly, an apartment buyer's agreement was executed between the parties to the complaint on 26.12.2012 for sale consideration of Rs.4,20,39,519/-. However, it is submitted that the sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which are to be paid by the complainants at the applicable stage. It is pertinent to mention herein that when the complainants had booked the unit with the respondents, the Act of 2016, was not in force and the provisions of the same cannot be applied retrospectively.

c. That the complainants made payment towards certain instalment demands on time and eventually started defaulting in doing so. Vide payment demand dated 24.02.2014, the respondent had sent the instalment demand for 9th instalment for the net payable amount of Rs.31,17,108/-. The complainants made the payment only after reminders dated 25.03.2014, 24.04.2014 and letter dated 22.04.2014 were sent by the respondent.

d. That as per the terms of the mutually agreed payment plan, respondent had raised the 10th instalment on 23.01.2015 for the net payable amount of Rs.31,17,108/-. However, the complainants made the payment only after reminders dated 10.03.2015 and 01.04.2015 were sent by the respondent. Vide payment requested dated 18.12.2016 the respondent had sent 11th instalment demand for net payable amount of Rs.24,57,176/-. However, yet again, despite reminders dated 11.01.2017, 25.01.2017 and final notice dated 21.02.2017, the

complainants have only remitted part payment out of the total demanded amount.

e. That the possession of the unit was supposed to be offered to the complainants in accordance with the terms and conditions of the buyer's agreement. As per clause 13.3 of the buyer's agreement and clause 35 of schedule 1 of the booking application form. Furthermore, the complainants had further agreed for an extended delay period of 12 months from the date of expiry of the grace period as per clause 13.5 of the agreement.

f. That from the aforesaid terms of the buyer's agreement, it is evident that the time to hand over the possession was to be computed from the date of receipt of all the requisite approvals. Even otherwise, construction could not have been raised in the absence of necessary approvals. It has been specified in sub-clause (v) of Clause 17 of the building plan dated 29.11.2010 that the clearance issued by the Ministry of Environments and Forest, Government of India has to be obtained before starting the construction of the project. That the environment clearance for construction of the said project was granted on 25.11.2010. Furthermore, under clause (v) of part B of the environment's clearance dated 25.11.2010, it was stated that approval from fire department was necessary prior to the construction of the project.

g. That the last of the statutory approvals which forms a part of the pre-conditions was the fire scheme approval which was granted on 28.10.2013 and the time period according to the agreement for offering the possession expired only on 28.04.2018. The respondent completed the construction of the tower in which the unit allotted to

the complainants is located and the photographs of the same are attached with reply. The respondent has already been received the occupation certificate dated 28.09.2017.

h. That the respondent offered the possession of the unit to the complainants vide notice of possession dated 16.07.2021 and intimated them to make the payment towards the balance amount of Rs.93,95,082/-. In the meanwhile, the finishing work of the unit in question was affected on account of certain unforeseeable circumstances and on account of ban on construction activities by the Hon'ble Supreme Court and several other authorities. The same falls under the ambit the definition of force majeure as defined in clause 24 of the apartment buyer's agreement and the respondent cannot be held accountable for the same.

i. That the complainants were bound to take the possession of the unit after making payment of the due amount and completing the documentation formalities as holding charges are being accrued as per the terms of the apartment buyer's agreement and the same is known to the complainants as is evident from a bare perusal of the notice of possession.

j. That the complainants are real estate investors who had booked the unit in question with an intention to earn quick profit in a short period of time. However, it appears that on account of slump in the real estate market, their calculations have gone wrong and they now have instead of making payments towards the demanded amount raised absolutely frivolous and false grounds to wriggle out of their contractual obligations. Even as per the terms of the agreement, the complainants have a very limited right to seek unilateral cancellation and they can

only do so on account of defaults, if any, committed by the respondent. It is reasserted that no illegality, default or wrong has been committed by the respondent and it has throughout acted strictly as per the terms of the allotment, rules, regulations and the directions given by the concerned authorities. Without prejudice to the rights of the respondent, the respondent is still willing to offer a substitute unit to the complainants provided they make payment towards the outstanding amount payable by them towards the cost of apartment. The complainants cannot be allowed to succeed in their malafide motives. The complainants are liable to make payment towards the due amount along with holding charges on account of delay on their part in taking over the possession as per the terms of the allotment even if a notice of possession has been issued by the respondent to the complainants.

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 21.09.2023, the counsel for the complainants states that he wishes to seeks instructions from the complainant-allottees if they are interested in possession after adjustment of delayed possession charges from the due date till valid offer of possession at the prescribed rate of interest and the complainants may file an application for amendment of relief.

9. Thereafter, the counsel for the complainants filed an application for amendment of the relief dated 07.12.2023, to which the counsel for the respondent stated that he has no objection if the amendment of relief

application is allowed. Accordingly, the amendment application is allowed on 18.01.2024.

10. The complainants and respondent have filed their written submissions on 29.01.2024 and 01.02.2024 respectively which are taken on record. No additional facts apart from the complaint or reply have been stated the written submissions.

E. Jurisdiction of the authority

11. 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

12. 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

13. 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.

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

F. Findings on the objections raised by the 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.

15. 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.

16. 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."*

17. 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."*

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-

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

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

19. 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.

20. 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.

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 that the finishing work of the project was delayed due to *force majeure* conditions including ban on construction activities by the Hon'ble Supreme Court of India vide order dated 04.11.2019 and Environment Pollution (Prevention and Control) Authority vide order dated 01.11.2019, The plea of the respondent regarding various orders of Hon'ble Supreme Court of India and Environment Pollution (Prevention and Control) Authority and all the pleas advanced in this regard are devoid of merit. The orders passed by Hon'ble Supreme Court of India and Environment Pollution (Prevention and Control) Authority 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. 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 maintainability of complaint on account of complainants being investor.

21. The respondent took a stand that the complainants are investor and not consumers and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainants are buyer, and they had paid total price of Rs.4,12,82,599/- to the promoter towards purchase of unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the flat buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainants

G. I Direct the respondent to handover the possession of the unit being duplex apartment bearing no. VV-B-35-04 on 34th floor, Tower-B, having super area of 4325 sq. ft. complete in all respect.

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

22. On The above-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.

23. The complainants have booked the residential apartment bearing unit no. VV-B-35-04 on 34th floor, tower-B, having tentative super area of 4325 sq. ft. in the project named as "The IREO Victory Valley" situated at sector 67, Gurugram for a total sale consideration of Rs.4,20,30,519/- out of which it has made payment of Rs.4,12,82,599/-. The complainants were allotted the above-mentioned unit vide allotment letter dated 20.09.2012. The apartment buyer agreement was executed between the parties on 26.12.2012. The complainants 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: -

> *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."*

24. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 26.12.2012, 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 being in default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, 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 36 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 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 residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

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 36 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter. 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.

28. 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 complainants.

29. By virtue of apartment buyer's agreement executed between the parties on 26.12.2012, the possession of the booked unit was to be delivered within 36 months from the date of approval of building plan (29.11.2010) which comes out to be 29.11.2013, grace period of 180 days which is not allowed in the present case.

30. On 29.11.2010, the building plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned plan stipulated that an NOC/ clearance from the fire authority shall be submitted within 90 days from the of issuance of the sanctioned building plans. Also, under section 15(2) and (3) of the Haryana Fire Service Act, 2009, it is the duty of the authority to grant a provisional NOC within a

period of 60 days from the date submission of the application. The delay/failure of the authority to grant a provisional NOC cannot be attributed to the developers. But here the sanction building plans stipulated that the NOC for fire safety (provisional) was required to be obtained within a period of 90 days from the date of approval of the building plans, which expired on 23.10.2013. It is pertinent to mention here that the developers applied for the provisional fire approval on 02.11.2011 after the expiry of the mandatory 90 days period got over. The approval of the fire safety scheme took more than 35 months from the date of the building plan approval i.e., from 29.11.2010 to 28.10.2013. The builders failed to give any explanation for the inordinate delay in obtaining the fire NOC.

31. In view of the above, the authority taken a view that the complainants /allottees 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.

32. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 36 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 29.11.2013. The respondent promoter

has sought further extension for a period of 180 days after the expiry of 36 months for unforeseen delays in respect of the said project. The respondent raised the contention that the finishing work of the project was delayed due to *force majeure* conditions including ban on construction activities by the Hon'ble Supreme Court of India vide order dated 04.11.2019 and Environment Pollution (Prevention and Control) Authority vide order dated 01.11.2019. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 29.11.2013. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Also, no substantial evidence/document has been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work. Therefore, the respondent cannot take benefit of his own wrong. Accordingly, the grace period of 180 days is disallowed and the due date of handing over possession comes out to be 29.11.2013.

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

34. 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.

35. 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 18.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85% per annum.

36. 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;"

37. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter

which is the same as is being granted to the complainants in case of delay possession charges.

38. 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 26.12.2012, the possession of the booked unit was to be delivered within 36 months from the date of approval of building plan (29.11.2010) which comes out to be 29.11.2013. 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 29.11.2013. Occupation certificate was granted by the concerned authority on 28.09.2017 and thereafter, the possession of the subject flat was offered to the complainants on 16.07.2021. 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 26.12.2012 to hand over the possession within the stipulated period.

39. 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 28.09.2017. The respondent offered the possession of the unit in question to the complainants only on 16.07.2021, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time

from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have 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 (16.07.2021) which comes out to be 16.09.2021.

40. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e., 10.85 % p.a. w.e.f. 29.11.2013 till the expiry of 2 months from the date of offer of possession (16.07.2021) which comes out to be 16.09.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

G.III Direct the respondent to pay the differential amount of circle rate payable in 2014 and the amount to be paid at the time of execution of sale deed of the said unit in question to the complainants.

41. As per clause 14.3 of unit buyer's agreement provides for 'conveyance of the unit and is reproduced below:

> *"14 Conveyance Deed and Stamp Duty*
> *14.3 The stamp duty, registration charges and any other incidental charges or dues, required to be paid for the registration of the conveyance deed or any other documents required to be executed pursuant to this agreement as well as the administrative/ facilitation charges therefor as per the policy of the company for facilitation of registration thereof, shall be borne by the allottee."*

42. The authority has gone through the conveyance deed and stamp duty clause of the agreement and observes that the stamp duty, registration charges and administrative charges shall be borne by the complainants-allottees at the time of execution of registration of conveyance deed.

43. Also, as per section 19 (6) of the Act, which is reproduced below:

> *"19 Rights and duties of allottees:*
> *19(6) Every allottee, who has entered into agreement or sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any."*

44. The authority is in view of that it is the duty of the complainants/allottee to pay the stamp duty, registration charges at the time of execution of registration of conveyance deed and administrative charges up to Rs.15,000/- as fixed by the local administration.

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 complainants against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 29.11.2013 till offer of possession (i.e., 16.07.2021) plus two months (i.e., 16.09.2021) as per proviso to section 18(1) of the Act read with rules 15 of the rules. The arrears of interest accrued so far shall be paid to the complainants 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 allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iii. The respondent is directed to supply a copy of the updated statement of account after adjusting the delayed possession charges.

iv. The complainants are 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 complainants/allottees and to get the conveyance deed of the allotted unit executed in their 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 complainants which is not the part of the buyer's agreement.

46. Complaint stands disposed of.

47. File be consigned to the registry.

Dated: 18.04.2024

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