

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

Complaint no. 2508 of 2019
Date of first hearing: 18.09.2019
Date of decision: 25.02.2020

M/s Aerostar Helmets Pvt. Ltd.
Address: 8/3, W.E.A. Abdul Aziz road,
Karol Bagh, New Delhi: 110005.

Versus

Complainant

M/s Ireo Grace Realtech Pvt. Ltd.,
Office at: 304, Kanchan House, Karampura,
Commercial complex, New Delhi: 110015.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Mohd. Faris
Shri M.K. Dang and Shri Garvit
Gupta

Advocate for the complainant
Advocates for the respondent

ORDER

1. The present complaint dated 14.06.2019 has been filed by the complainant/allottee in form CRA 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 to the allottee as per the apartment buyer's agreement executed inter se them.

2. The particulars of the project, the details of 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:-

1.	Name and location of the project	The Corridors, Sector 67-A, Gurgaon, Haryana
2.	Nature of real estate project	Group housing colony
3.	Area of the project	37.5125 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid/renewed upto 20.02.2021
5.	Name of the licensee	Precision Realtors Pvt. Ltd. and others (as per DTCP record)
6.	Apartment no.	703, 7 th floor, tower B3
7.	Unit area	1920.08 sq. ft (super area)
8.	Date of receipt of occupation certificate	31.05.2019 (Annx R 8, Pg. 131 of the reply)
9.	RERA registered/not registered	Registered in three phases
10.	RERA registration no.	Registered vide no. 378 of 2017 (for phase I) dated 07.12.2017 Registered vide no. 377 of 2017 (for phase II of 13.152 acres of project land of 13.25 acres) dated 07.12.2017 Registered vide no. 379 of 2017 (for phase III of 8.628 acres of project land) dated 07.12.2017
11.	Completion date as per RERA	30.06.2020(Phase 1)

	registration certificate	30.06.2020(Phase2) 31.12.2023(Phase 3)
12.	Environment clearance received on	12.12.2013
13.	Builder plans approved on	23.07.2013 (Annx R3, Pg. 107 of the reply)
14.	Fire scheme approval received on	27.11.2014
15.	Date of apartment buyer's agreement	22.04.2014(Annx R2, Pg. 49 of the reply)
16.	Total consideration	Rs. 2,16,27,421/- (as per SOA dated 13.06.2019, Pg. 135 of the reply)
17.	Total amount paid by the complainant	Rs. 1,89,07,158/- (as per SOA dated 13.06.2019, Pg. 135 of the reply)
18.	Payment plan	Instalment payment plan
19.	Due date of delivery of possession as per clause 13.3 of apartment buyer's agreement: 42 months + 180 days grace period from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder)	27.11.2018 Note- Due date of delivery of possession is calculated from the date of approval of fire scheme i.e. 27.11.2014. (copy filed by the respondent)
20.	Date of offer of possession letter	13.06.2019 (copy filed by the respondent, Pg. 133 of the reply)
21.	Delay in handing over possession till offer of possession	6 months and 17 days.
22.	Relief sought (in specific terms)	• Direct the respondent to

		<p>handover the possession of the apartment completed in all respect without any excess demand on account of any charges levied.</p> <ul style="list-style-type: none">• Direct the respondent to pay delay possession charges at the prescribed rate of interest.
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3. As per the apartment buyer agreement in question vide clause no. 13.3 the possession was to be handed over within a period of 42 months from the date of sanction of building plans and/or fulfilment of the preconditions imposed thereunder + 180 days grace period. The relevant clause of the apartment buyer's agreement reads as under:-

*".....the Company proposes to offer the possession of the said apartment to the Allottee within a period of 42 (Forty Two) months from the date of approval of the 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**")....."*

4. On the basis of documents made available by the respondent, the building plans were approved by the competent authority vide letter no.46743 dated 23.07.2013 with a condition under cause 17 (iv) that the colonizer shall obtain the clearance/NOC as per the provisions of notification no.S01533 © dated 14.09.2006 issued by the Ministry of Environment & Forest,

Government of India, before starting the construction/execution of development works at site. The environment clearance has been obtained on 12.12.2013 wherein under clause 39 there is pre-requisite compliance regarding fire safety approval from the fire department before the start of construction.

5. The fire approvals from the competent authority has been obtained by the promoter on 27.11.2014. As per clause 35 of environment clearance certificate dated 12.12.2013, the project proponent shall obtain permission of Mines & Geology Department for excavation of soil before the start of construction. Requisite permission from the Department of Mines and Geology Department has been obtained on 4.3.2014 (copy of the same placed on record), as such, the date of start of construction comes out to be 27.11.2014.
6. Possession of the apartment has been offered on 13.06.2019 i.e. after a delay of more than six months. Hence, this complaint for the aforementioned reliefs.
7. On the date of hearing the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.
8. The respondent contests the complaint on 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 enforced retrospectively. That there is no cause of action to file the present complaint. The respondent submitted that the complainant has no locus standi to file the present complaint.

- ii. That occupation for 700 apartments in the project was received on 31.05.2019. occupation certificate of apartment of the complainant has been received and notice of possession to complainant was dispatched 13.06.2019, thus the complainant shall pay balance sale consideration, stamp duty as per notice of possession so that possession and conveyance deed be executed in favour of complainant.
- iii. That according to the booking application form and the apartment buyer's agreement, the time period for offering the possession of the unit to the complainant has not yet elapsed and the complaint has been filed pre-maturely by them.
- iv. 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 apartment buyer's agreement.
- v. That the complainant, after checking the veracity of the project namely, 'Corridor, Sector 67A, Gurugram had applied for allotment of an apartment vide their booking application form. The complainant agreed to be bound by the terms and

conditions of the booking application form agreed upon by them.

- 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 buyer's agreement. It is submitted that clause 13.3 of the buyer's agreement and clause 43 of the schedule - I of the booking application form states that *'...subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period)...*'. Furthermore, the complainant has 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 apartment buyer's agreement. Clause 13.5 read as under: -

"Subject to Clause 13.3, in the event of delay by the Company in offering the possession of the said Apartment beyond a period of 12 months from the end of the Grace Period (such 12 month period hereinafter referred to as the "**Extended Delay Period**"), then the Allottee shall become entitled to opt for termination of the Allotment/Agreement and refund of the actual paid up instalment (s) paid by it against the said Apartment after adjusting the interest on delayed payments

along with Delay Compensation for 12 month. Such refund shall be made by the Company within 90 days of receipt of intimation to this effect from the Allottee, without any interest thereon. For the removal of doubt, it is clarified that the Delay Compensation payable to the Allottee who is validly opting for termination, shall be limited to and calculated for the fixed period of 12 months only irrespective of the date on which the Allottee actually exercised the option for termination. This option may be exercised by the Allottee only up till dispatch of the Notice of Possession by the Company to the Allottee whereupon the said option shall be deemed to have irrevocably lapsed. No other claim, whatsoever, monetary or otherwise shall lie against the Company and/or the Confirming Parties nor be raised otherwise or in any other manner by the Allottee”.

- vii. The respondent submitted that the respondent company has already completed the construction of the tower in which the unit allotted to the complainant is located and the photographs of the same have been produced on record.
- viii. The respondent submitted that the complainant are real estate investors who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate market and the complainant now wants to somehow get out of the concluded contract made by them on highly flimsy and baseless grounds. Such malafide tactics of the complainant jkcannot be allowed to succeed.

9. 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.
10. The Authority on the basis of information and explanation and other submissions made and the documents filed by the complainant and the respondent is of the considered view that there is no need of further hearing in the complaint.
11. Arguments heard.
12. Counsel for the respondent has submitted that due to force majeure i.e. restriction/ban on construction activity by the order of NGT and other authorities, they could not complete the project within the stipulated period as per clause 13.3 of the apartment buyer agreement. However, counsel for the complainant has raised an issue that six months' grace period beyond 42 months has already been given in this case as per clause 13.3 of the agreement and therefore, additional grace period due to ban imposed by the NGT or any other authorities may not be allowed in case such total ban does not exceed six months' period. Hence, keeping in view the facts and circumstances of the matter, the additional extended grace period of 12 months due to the ban imposed by the NGT or any other authorities is not allowed to the respondent in terms of clause 13.5 of the agreement. The stipulation made in clause 13.5 of the BBA is too vague to understand. It has not been clarified

under which circumstances additional extended delay period was required to be availed by the respondent.

13. Clause 13.3 describes the period within which construction attached had to be completed and possession of the apartment handed over to the complainant. This clause, granted 180 days grace period also to the respondent still not satisfied with this grace period the respondent against availed 12 months' extended delay period in clause 13.5 and not in clause 13.4 of the agreement which deals with the award of delay compensation. In our considered opinion, clause 13.5 is onerous and it amounts to unfair trade practice on the part of respondent.

14. As regards the issue of arbitration clause is concerned, the Authority is of the considered opinion that it has been held in a 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.

15. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal**

no.23512-23513 of 2017 and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The same analogy shall apply to the complaint cases filed before the Authority under the Act. Section 89 of the Act makes the things crystal clear. Section 89 of the Act reads as under:-

“The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Section 89 does not call for any interpretation. The Act being latter in time shall have overriding effect over the Arbitration and Conciliation Act, 1996. Consequently, the Authority is not bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

16. On consideration of the circumstances, the evidence and other record and submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2)(a), the Authority observes that the building plans were approved by the competent authority vide letter no. 46743 dated 23.07.2013 with a condition under clause 17 (iv) that the colonizer shall obtain the clearance/ NOC as per the provisions of notification no. S01533 (c) dated 14.09.2006 issued by the ministry of Environment and Forest, Government of India, before starting the construction/ execution of development works at

site. The environment clearance has been obtained on 12.12.2013 wherein under clause 39, there is pre - requisite compliance regarding fire safety approval from the fire department before the start of construction. The fire approval from the competent authority has been obtained by the promoter on 27.11.2014. Moreover, as per clause 35 of the environment clearance certificate dated 12.12.2013, the proponent is required to obtain permission of mines and geology department for excavation of soil before the start of construction. Requisite permission from the mines and geology department has been obtained in this case on 04.03.2014.

17. As such, the date of start of construction comes out to be 27.11.2014 which is the date when the permission from fire department has been obtained by the promoter in pursuance of clause 39 of the environment clearance before start of construction. As per clause 13.3 of the apartment buyer's agreement dated 22.04.2014 the due date of delivery of possession has been worked out to be 27.11.2018. Accordingly, it is the failure of the promoter to fulfil his obligations, responsibilities as per the apartment buyer's agreement dated 22.04.2014 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) of the Act on the part of the respondents is established.

18. Hence, the Authority hereby pass the following order and issue directions under section 34(f) of the Act:-

1. The respondent is directed to pay delayed possession charges at the prevalent prescribed rate of interest of 10.15% p.a. with effect from 27.11.2018 (due date of delivery of possession) till the offer of possession i.e. 13.06.2019 in terms of section 18(1) proviso of the Act read with Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 within a period of 90 days from the date of this order.
2. The complainant is directed to take possession of the apartment within a period of one month from the date of order after paying outstanding dues, if any with the prescribed rate of interest of 10.15% per annum as awarded to them in the form of delay possession charges.
3. The respondent is further directed not to charge anything from the complainant which is not the part of apartment buyer's agreement.

18. The complaint is disposed of accordingly.

19. Case file be consigned to the registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Subhash Chander Kush)

Member

Dated:25.02.2020.