

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

**Complaint No. : 629 of 2018**  
**First date of hearing: 25.09.2018**  
**Date of Decision : 14.12.2018**

M/s Brady Estates Pvt. Ltd.,  
Address: Brady house, 4<sup>th</sup> floor, 12/14, veer  
Nariman Road fort, Mumbai-400001

**Complainant**

Versus

M/s Ireo Pvt. Ltd.  
Regd. Office:A-11, 1<sup>st</sup> floor,  
Niti Bagh, New Delhi-110049.

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Adarsh Priyadarshi and Advocate for the complainant  
Shri Aditya  
Shri M.K. Dang Advocate for the respondent

**HARERA**  
**GURUGRAM**

**ORDER**

1. A complaint dated 30.07.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant M/s. M/s Brady Estates Pvt. Ltd, against the promoter M/s Ireo Pvt. Ltd





in respect of apartment/unit described below in the project 'Ireo Gurgaon Hills', Sector-2, Gurugram on account of violation of the section 3 of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 20.11.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -
  - Nature of the project- Group housing colony

1.	Name and location of the project	"Ireo Gurgaon Hills", Sector-2, Village Gwal Pahari, Tehsil Sohna, District Gurugram.
2.	Project area	11.07 acres
3.	Nature of unit	Group housing colony
4.	RERA registered/ Unregistered.	<b>Unregistered</b>
5.	Applied for occupation certificate on	<b>24.09.2018</b>
6.	Apartment/unit no.	A18-41, 17 <sup>th</sup> floor, tower A,
7.	Apartment measuring	6388.05 sq. ft.
8.	Date of execution of apartment buyer's agreement	20.11.2012
9.	Payment plan	Construction linked payment plan
10.	Total cost as per payment plan annexed to the agreement	Rs. 6,78,35,086/-





11.	Total amount paid by the complainant till date	Rs. 6,02,71,966 /-
12.	Date of delivery of possession as per clause 14.3 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)	21.08.2017 <b>Consent to Establish- 21.08.2013</b>
13.	Delay in handing over possession till date	1 year 3 months 24 months
14.	Penalty clause as per apartment buyer's agreement dated 20.11.2012	Clause 14.4 of the agreement i.e. Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of possession of the said apartment to the allottee.

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. An apartment buyer's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 21.08.2017. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of





possession of the said apartment to the allottee as per clause 14.4 of apartment buyer's agreement dated 20.11.2012. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 25.09.2018. The case came up for hearing on 25.09.2018 and 14.12.2018.

#### **Facts of the complaint**

6. Briefly stated, the facts of the complaint are that the complainant is a company incorporated under the Companies Act, 1956 having its registered office at brady House, 4<sup>th</sup> floor, 12/14, Veer Nariman Road Fort, Mumbai, Maharashtra-400001. The complainant is an "allottee" within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. The present complaint is being filed by Mr. Rajender Kumar Sharma, who has been given the authority letter by the complainant company. A copy of the letter of authority dated 30.05.2018.

7. The complainant submitted that the complainant made an application for booking an apartment having super area of 6388 sq. ft. bearing no. A 18-41, on 17<sup>th</sup> floor, tower A at





Sector 2, Gwal Pahari in the said project. The complainant paid a cheque of Rs. 45,00,000/- towards booking amount.

8. The complainant submitted that the on 16.08.2012, the respondent issued an offer of allotment letter in favour of the complainant. The complainant further submitted that on 20.11.2012 an apartment buyer's agreement was executed between respondent and complainant where under the respondent agreed to sell, transfer and convey the said unit and the complainant agreed to buy the said apartment.
9. The complainant submitted that during 2012-2017, in terms of the agreement various payments were made by the complainant from time to time and these payments were acknowledged by the respondent.
10. The complainant submitted that since the construction was not being carried on and delivery of possession was not given within the stipulated time of 60 months (with grace period) from the date of approval of building plan in May 2012, the complainant terminated the buyer's agreement by its letter dated 10.01.2018 and requested the respondent to refund the entire amount paid by the complainant along with compensation and interest.





11. The complainant submitted that as there was no response to the letter of complainant, the complainant was constrained to send a legal notice dated 13.02.2018 to the Respondent seeking refund of the entire amount paid along with interest and compensation. The complainant submitted that by reply to legal notice dated 13.02.2018, the respondent took false and frivolous grounds to deny its liability and stated that the period of 60 months were to be computed from 26.12.2013 and not May, 2012. It is submitted that defense of respondent is a moonshine and doctored defense only to somehow wriggle out of its liabilities. The complainant stated that a rejoinder to the above reply was sent on behalf of the complainant annexing an email of the respondent admitting that the approval for the building plan was granted in May 2012.

12. The complainant submitted that no construction activity has been carried out in the proposed building for last many months. The respondent has failed to stand by its commitment and has failed to deliver the possession of the said apartment within 60 months time frame after approval of building plan or even thereafter. The respondent is somehow trying to justify the delay by giving their own meaning to the relevant clause of buyer's agreement, which is





patently incorrect. The respondent has not responded to the request of complainant for refund of money. Almost 6 years have passed since the complainant booked the flat with the respondent. Despite paying a total amount of Rs.6,02,71,966/- and waiting for almost 6 years, the flat in question is nowhere near completion. Hence the complainant is seeking refund of the entire amount paid along with interest and compensation for delay.

**13. Issues raised by the complainant are as follow:**

- i. **Whether the complainant is entitled to refund of the entire amount of Rs.6,02,71,966/- paid by it to the respondent along with interest from the respondent on the ground of failure by respondent to deliver possession of the said apartment without any reasonable justification? [Note: the respondent has applied for OC on 24.09.2018.]**

**14. Relief sought:**

**The complainant is seeking the following reliefs:**

- i. **Allow the present complaint in favour of the complainant and against the respondent.**
- ii. **Direct the respondent to refund the entire amount of Rs.6,02,71,966/- paid to the respondent with**





**interest of 18% from the date of receipt to the date of realisation.**

- iii. **Direct the respondent to pay cost of litigation to the complainant.**

**Respondent's reply**

15. The respondent submitted that it is denied that Mr. Rajinder Kumar Sharma has been given the authority letter by the complainant company. The authority letter as attached by the complainant is bogus, false and fabricated. The complainant company comprises of shrewd, clever and dishonest type of people and the present baseless and false complaint has been filed to harass the respondent company to submit to its unreasonable demands.
16. The respondent submitted that the respondent is a reputed real estate company having immense goodwill, comprising of law abiding and peace loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as Grand Arch, Victory Valley, Skyon and Uptown and in most of these projects several families have already taken possession.
17. The respondent submitted the complainant had booked the unit on its free own will and after going through the terms







and conditions. Instead, the complainant has unlawfully and illegally tries to wiggle out of its contractual obligations by unilaterally terminating the allotment without any fault on the part of the respondent company.

18. The respondent submitted that the complainant unlawfully and illegally terminated the agreement and requested the respondent to refund the entire amount paid by the complainant along with compensation and interest.
19. The respondent submitted that in the present case, it may be noted that the fire safety scheme approval was granted on 26.12.2013, the pre-condition of obtaining all the requisite approvals was fulfilled only on 26.12.2013. The complainant vide clause 14.5 of the apartment buyer's agreement had further agreed to the extended delay period of 12 months from the end of grace period. Therefore, 60 months from 26.12.2013 shall expire only on 26.12.2018, there cannot be delay till 26.12.2018. the time period for offering the possession of the unit has not yet elapsed and the complainant has pre-maturely filed the present baseless and false complainant.
20. The respondent submitted that it is wrong and denied that no construction activity has been carried out in the proposed





building for last many months and failed to stand by its commitment to deliver the possession of the new flat within the alleged 60 months' time frame from approval of building plan or even thereafter. The respondent is somehow trying to justify the failure to deliver by giving its own meaning to the relevant clause of buyer's agreement. It is also wrong and denied that the respondent has not responded to the request of the complainant for refund of money.

21. **Determination of issues:**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

22. With respect to the **sole issue** raised by the complainant, the authority came across that as per clause 14.3 of apartment buyer's agreement, the possession of the flat was to be handed over within 42 months (plus grace period of 6 months) from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder. Therefore, the due date of handing over possession will be computed from 2108.2013, i.e the consent to establish. The clause regarding the possession of the said unit is reproduced below:



*"14. Possession and holding charges*

*14.3 ...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 unforeseen delays beyond the reasonable control of the company."*

23. Accordingly, the due date of possession was 21.08.2017 and the possession has been delayed by one year three months and twenty-four days till the date of decision. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause 14.4 of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion*





*certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

As the possession of the flat was to be delivered by 21.08.2017 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

25. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

**34 (f) Function of Authority -**

*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.*

The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation which is reproduced below:

**37. Powers of Authority to issue directions**

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.*



26. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

**Findings and directions of the authority**

27. The objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

28. The counsel for the respondent has stated at bar that he has applied for registration of the project. They have also applied for occupation certificate on 24.9.2018.

29. The date for handing over the possession should have been counted from the date they received consent to establish and other approvals which is of cardinal importance to the builder and if we count the date of offer of possession i.e. 42+6 months + consent to establish then the date of possession comes out to be 21.8.2017 whereas counsel for the respondent is impinging upon 42+12+6 which is quite





unfair and one sided for the purpose of computing the time line for delivery of possession of unit. Only 42+6+consent to establish should have been counted for all intents and purposes. Accordingly, due date of delivery of possession comes out to be 21.8.2017. However, it has been alleged that no delivery of possession has been given as on date. As such complainant is entitled for delayed possession charges @ 10.75% per annum as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, till the actual handing over the offer of possession failing which the complainant is entitled to withdraw from the project.

30. Other contentions raised by the complainant have not been substantiated by virtue of any substantial evidence, as such they are non est for the purposes of taking any decision at the moment.

31. The respondent submitted that this hon'ble authority does not possess requisite jurisdiction to adjudicate on this matter by virtue of the arbitration clause, contained in clause 36 of the agreement between the parties. The authority is of considered opinion that amendment of Sec. 8 of the Arbitration and Conciliation Act does not have the effect of nullifying the ratio of 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.

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.

#### **Directions of the authority**

32. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to pay interest @ 10.75% p.a. on the paid amount to the complainant



from the due date of delivery of possession up till the date of order i.e. 21.08.2015 to 14.12.2018.

- (ii) The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the date of order on the paid amount by the complainant which comes to be Rs. 85,25,078/- shall be paid to the complainant within 90 days from the date of this order.
- (iii) Thereafter, the monthly payment of interest i.e. Rs. 5,39,936.38/- till handing over of the possession, so accrues shall be paid before 10<sup>th</sup> of subsequent month.
- (iv) If the possession is not given by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid.*



*Deleted  
vide  
order  
dated  
12/03/19.*

33. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.
34. The order is pronounced.



35. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

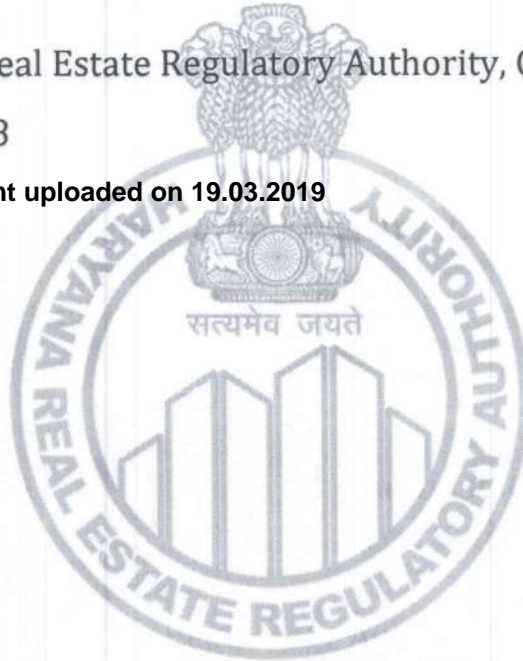
**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 14.12.2018

Corrected Judgement uploaded on 19.03.2019



**HARERA**  
GURUGRAM



**PROCEEDINGS OF THE DAY**

Day and Date	Friday and 14.12.2018
Complaint No.	629/2018 Case titled as M/S Brady Estates Private Limited V/S M/S Ireo Private Limited
Complainant	M/S Brady Estates Private Limited
Represented through	S/Shri Adarsh Priyadarshi and Aditya, Advocates for the complainant.
Respondent	M/S Ireo Private Limited
Respondent Represented through	Shri M.K.Dang, Advocate for the respondent.
Last date of hearing	25.9.2018
Proceeding Recorded by	Naresh Kumari & H.R.Mehta

**Proceedings**

Arguments heard.

Written arguments and case laws filed by the counsel for the respondent today.

Counsel for the respondent has stated at bar that he has applied for registration of the project. They have also applied for Occupation Certificate on 24.9.2018.

Brief facts of the case are that complainant had booked a unit No.A18-41, 17<sup>th</sup> floor, Tower-A, in project "Ireo Gurgaon Hills", village Gwal Pahari, Tehsil Sohna, District Gurugram and an Apartment Buyer Agreement inter-se the parties was executed on 20.11.2012. As per clause 14.3 of the

agreement, possession of the unit was to be handed over to the complainant within a period of 42 months + 6 months grace period + consent to establish i.e. 21.8.2013 which comes out to be 21.8.2017. As per para 54 of BBA which reads as under:-

***“Subject to Force Majeure and further subject to the Applicant having complied with all its obligations under the terms and conditions of this Agreement, and the Applicant not being in default under any part of this Agreement including but not limited to the timely payment of the total Sale Consideration, stamp duty and other charges/fees/taxes/levies 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 Applicant within a period of 42 months from the date of approval of the building plans and/or fulfilment of the pre-conditions imposed thereunder(“Commitment Period”). The Applicant further agrees and understands that the Company shall additionally be entitled to a period of six months (180 days)(“Grace Period”), after the expiry of said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company. Subject to the condition contained herein, if the Company fails to offer possession of the said Apartment to the Applicant by the end of the Grace Period, it shall be liable to pay to the Applicant compensation calculated at the rate of Rs.10/- (Rupees Ten Only) per sq ft of Super Area(“Delay Compensation”) for every month of delay thereafter until the actual date fixed by the Company for offering possession of the said Apartment to the Applicant. The Applicant shall be entitled to payment/adjustment against such ‘Delay Compensation’ only at the time of ‘Notice of Possession’ or at the time of final instalment, whichever is earlier.***

The date for handing over the possession should have been counted from the date they received consent to establish and other approvals which is of cardinal importance to the builder and if we count the date of offer of possession i.e. 42+6 months + consent to establish then the date of possession comes out to be 21.8.2017 whereas counsel for the respondent is impinging upon 42+12+6 which is quite unfair and one sided for the purpose of computing the time line for delivery of possession of unit. Only

42+6+consent to establish should have been counted for all intents and purposes. Accordingly, due date of delivery of possession comes out to be 21.8.2017. However, it has been alleged that no delivery of possession has been given as on date. As such complainant is entitled for delayed possession charges @ 10.75% per annum as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, till the actual handing over the offer of possession failing which the complainant is entitled to withdraw from the project.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of issuance of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10<sup>th</sup> of subsequent month. Amount, if any, due from the complainant may be adjusted mutually.

Other contentions raised by the complainant have not been substantiated by virtue of any substantial evidence, as such they are *non est* for the purposes of taking any decision at the moment.

The matter is disposed of accordingly. Detailed order will follow.  
File be consigned to the registry.

Samir Kumar  
(Member)  
14.12.2018

Subhash Chander Kush  
(Member)  
14.12.2018

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

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1. A complaint dated 30.07.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant M/s. M/s Brady Estates Pvt. Ltd, against the promoter M/s Ireo Pvt. Ltd



in respect of apartment/unit described below in the project 'Ireo Gurgaon Hills', Sector-2, Gurugram on account of violation of the section 3 of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 20.11.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -
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1.	Name and location of the project	"Ireo Gurgaon Hills", Sector-2 , Village Gwal Pahari, Tehsil Sohna, District Gurugram.
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9.	Payment plan	Construction linked payment plan
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11.	Total amount paid by the complainant till date	Rs. 6,02,71,966 /-
12.	Date of delivery of possession as per clause <b>14.3 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)</b>	21.08.2017 <b>Consent to Establish- 21.08.2013</b>
13.	Delay in handing over possession till date	1 year 3 months 24 months
14.	Penalty clause as per apartment buyer's agreement dated 20.11.2012	Clause 14.4 of the agreement i.e. Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of possession of the said apartment to the allottee.

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. An apartment buyer's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 21.08.2017. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of



possession of the said apartment to the allottee as per clause 14.4 of apartment buyer's agreement dated 20.11.2012. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 25.09.2018. The case came up for hearing on 25.09.2018 and 14.12.2018.

#### **Facts of the complaint**

6. Briefly stated, the facts of the complaint are that the complainant is a company incorporated under the Companies Act, 1956 having its registered office at brady House, 4<sup>th</sup> floor, 12/14, Veer Nariman Road Fort, Mumbai, Maharashtra-400001. The complainant is an "allottee" within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. The present complaint is being filed by Mr. Rajender Kumar Sharma, who has been given the authority letter by the complainant company. A copy of the letter of authority dated 30.05.2018.



7. The complainant submitted that the complainant made an application for booking an apartment having super area of 6388 sq. ft. bearing no. A 18-41, on 17<sup>th</sup> floor, tower A at



Sector 2, Gwal Pahari in the said project. The complainant paid a cheque of Rs. 45,00,000/- towards booking amount.

8. The complainant submitted that the on 16.08.2012, the respondent issued an offer of allotment letter in favour of the complainant. The complainant further submitted that on 20.11.2012 an apartment buyer's agreement was executed between respondent and complainant where under the respondent agreed to sell, transfer and convey the said unit and the complainant agreed to buy the said apartment.
9. The complainant submitted that during 2012-2017, in terms of the agreement various payments were made by the complainant from time to time and these payments were acknowledged by the respondent.
10. The complainant submitted that since the construction was not being carried on and delivery of possession was not given within the stipulated time of 60 months (with grace period) from the date of approval of building plan in May 2012, the complainant terminated the buyer's agreement by its letter dated 10.01.2018 and requested the respondent to refund the entire amount paid by the complainant along with compensation and interest.



11. The complainant submitted that as there was no response to the letter of complainant, the complainant was constrained to send a legal notice dated 13.02.2018 to the Respondent seeking refund of the entire amount paid along with interest and compensation. The complainant submitted that by reply to legal notice dated 13.02.2018, the respondent took false and frivolous grounds to deny its liability and stated that the period of 60 months were to be computed from 26.12.2013 and not May, 2012. It is submitted that defense of respondent is a moonshine and doctored defense only to somehow wriggle out of its liabilities. The complainant stated that a rejoinder to the above reply was sent on behalf of the complainant annexing an email of the respondent admitting that the approval for the building plan was granted in May 2012.

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patently incorrect. The respondent has not responded to the request of complainant for refund of money. Almost 6 years have passed since the complainant booked the flat with the respondent. Despite paying a total amount of Rs.6,02,71,966/- and waiting for almost 6 years, the flat in question is nowhere near completion. Hence the complainant is seeking refund of the entire amount paid along with interest and compensation for delay.

**13. Issues raised by the complainant are as follow:**

- i. **Whether the complainant is entitled to refund of the entire amount of Rs.6,02,71,966/- paid by it to the respondent along with interest from the respondent on the ground of failure by respondent to deliver possession of the said apartment without any reasonable justification? [Note: the respondent has applied for OC on 24.09.2018.]**

**14. Relief sought:**

**The complainant is seeking the following reliefs:**

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**interest of 18% from the date of receipt to the date of realisation.**

**iii. Direct the respondent to pay cost of litigation to the complainant.**

### **Respondent's reply**

15. The respondent submitted that it is denied that Mr. Rajinder Kumar Sharma has been given the authority letter by the complainant company. The authority letter as attached by the complainant is bogus, false and fabricated. The complainant company comprises of shrewd, clever and dishonest type of people and the present baseless and false complaint has been filed to harass the respondent company to submit to its unreasonable demands.
16. The respondent submitted that the respondent is a reputed real estate company having immense goodwill, comprising of law abiding and peace loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as Grand Arch, Victory Valley, Skyon and Uptown and in most of these projects several families have already taken possession.
17. The respondent submitted the complainant had booked the unit on its free own will and after going through the terms



and conditions. Instead, the complainant has unlawfully and illegally tries to wiggle out of its contractual obligations by unilaterally terminating the allotment without any fault on the part of the respondent company.

18. The respondent submitted that the complainant unlawfully and illegally terminated the agreement and requested the respondent to refund the entire amount paid by the complainant along with compensation and interest.
19. The respondent submitted that in the present case, it may be noted that the fire safety scheme approval was granted on 26.12.2013. the pre-condition of obtaining all the requisite approvals was fulfilled only on 26.12.2013. The complainant vide clause 14.5 of the apartment buyer's agreement had further agreed to the extended delay period of 12 months from the end of grace period. Therefore, 60 months from 26.12.2013 shall expire only on 26.12.2018, there cannot be delay till 26.12.2018. the time period for offering the possession of the unit has not yet elapsed and the complainant has pre-maturely filed the present baseless and false complainant.
20. The respondent submitted that it is wrong and denied that no construction activity has been carried out in the proposed



building for last many months and failed to stand by its commitment to deliver the possession of the new flat within the alleged 60 months' time frame from approval of building plan or even thereafter. The respondent is somehow trying to justify the failure to deliver by giving its own meaning to the relevant clause of buyer's agreement. It is also wrong and denied that the respondent has not responded to the request of the complainant for refund of money.

21. **Determination of issues:**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

22. With respect to the **sole issue** raised by the complainant, the authority came across that as per clause 14.3 of apartment buyer's agreement, the possession of the flat was to be handed over within 42 months (plus grace period of 6 months) from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder. Therefore, the due date of handing over possession will be computed from 2108.2013, i.e the consent to establish. The clause regarding the possession of the said unit is reproduced below:



*“14. Possession and holding charges*

*14.3 ...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 unforeseen delays beyond the reasonable control of the company.”*

23. Accordingly, the due date of possession was 21.08.2017 and the possession has been delayed by one year three months and twenty-four days till the date of decision. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause 14.4 of apartment buyer’s agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

*“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion*



*certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”*

As the possession of the flat was to be delivered by 21.08.2017 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

25. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

**34 (f) Function of Authority –**

*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.*

The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation which is reproduced below:

**37. Powers of Authority to issue directions**

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.*





26. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

### Findings and directions of the authority

27. The objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

28. The counsel for the respondent has stated at bar that he has applied for registration of the project. They have also applied for occupation certificate on 24.9.2018.

29. The date for handing over the possession should have been counted from the date they received consent to establish and other approvals which is of cardinal importance to the builder and if we count the date of offer of possession i.e. 42+6 months + consent to establish then the date of possession comes out to be 21.8.2017 whereas counsel for the respondent is impinging upon 42+12+6 which is quite



unfair and one sided for the purpose of computing the time line for delivery of possession of unit. Only 42+6+consent to establish should have been counted for all intents and purposes. Accordingly, due date of delivery of possession comes out to be 21.8.2017. However, it has been alleged that no delivery of possession has been given as on date. As such complainant is entitled for delayed possession charges @ 10.75% per annum as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, till the actual handing over the offer of possession failing which the complainant is entitled to withdraw from the project.

30. Other contentions raised by the complainant have not been substantiated by virtue of any substantial evidence, as such they are non est for the purposes of taking any decision at the moment.

31. The respondent submitted that this hon'ble authority does not possess requisite jurisdiction to adjudicate on this matter by virtue of the arbitration clause, contained in clause 36 of the agreement between the parties. The authority is of considered opinion that amendment of Sec. 8 of the Arbitration and Conciliation Act does not have the effect of nullifying the ratio of 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.

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.

#### **Directions of the authority**

32. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to pay interest @ 10.75% p.a. on the paid amount to the complainant



from the due date of delivery of possession up till the date of order i.e. 21.08.2015 to 14.12.2018.

- (ii) The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the date of order on the paid amount by the complainant which comes to be Rs. 85,25,078/- shall be paid to the complainant within 90 days from the date of this order.
- (iii) Thereafter, the monthly payment of interest i.e. Rs. 5,39,936.38/- till handing over of the possession, so accrues shall be paid before 10<sup>th</sup> of subsequent month.
- (iv) If the possession is not given by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid*.



33. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

34. The order is pronounced.

35. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

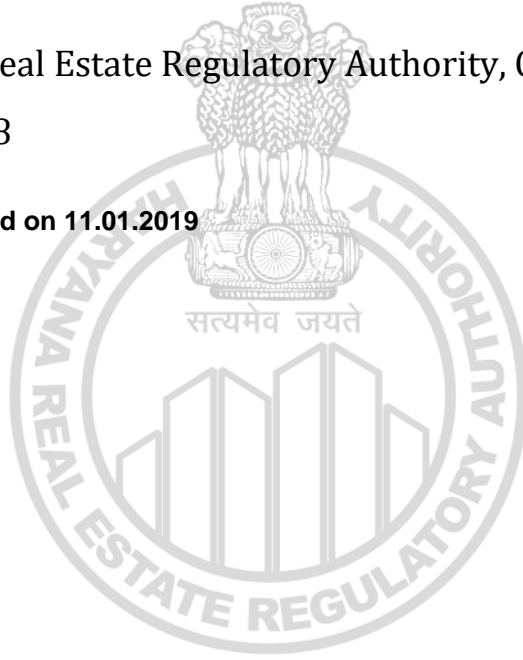
**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 14.12.2018

Judgement Uploaded on 11.01.2019



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GURUGRAM

