BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2549 of 2021**
Date of filing	:	**28.06.2021**
First date of hearing:		**20.08.2021**
Date of decision	:	**06.10.2021**

1. Mrs. Sangita Khurana
2. Mr. Rajnish Khurana

Both RR/O:- C-685, New Friends Colony, New Delhi- 110065 **Complainants**

Versus

M/s IREO Victory Valley Pvt. Ltd.
Regd. Office at:- Ireo Campus, Archview Drive, Ireo City, Golf Course Extension, Gururam-122101 **Respondent**

CORAM
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Gaurav Rawat (Advocate) Complainants
Sh. M.K Dang (Advocate) Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of 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.	Heads	Information
1.	Project name and location	"Ireo Victory Valley", Golf course extension road, Sector 67, Gurugram, Haryana
2.	Project area	24.6125 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. & validity status	**244 of 2007** dated 26.10.2007 and valid upto 25.10.2017
5.	Name of licensee	KSS Properties Pvt. Ltd. and one other
6.	RERA Registration	**Not registered**
7.	Date of approval of building plan	29.11.2010 (annexure- R11 on page no. 49 of the reply)
8.	Date of allotment	17.08.2010 (annexure- P/2 on page no. 22 of the complaint)
9.	Date of execution of apartment buyer's agreement	21.03.2011 (annexure-P/3 on page no. 31 of the complaint)

10.	Unit no.	D(17)102, 1st Floor, tower-D(17) (annexure- P/3 on page no. 34 of the complaint)
11.	Unit admeasuring	2831 sq. ft. (annexure- P/3 on page no. 34 of the complaint)
12.	Payment plan	Instalment payment plan (annexure- P/3 on page no. 62 of the complaint)
13.	Total sale consideration	Rs. 1,91,51,004/- (annexure- P/4 on page no. 80 of the complaint)
14.	Total amount paid by the respondent	Rs. 1,80,11,504/- (annexure- P/4 on page no. 80 of the complaint)
15.	Possession clause	**13.3** Subject to Force Majeure, as defined herein and further subject to the Allottees having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges

		including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees **within a period of 36 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("Commitment Period").** The Allottees further agrees and understands **that the company shall additionally be entitled to a period of 180 days ("Grace Period")**, after the expiry of the said Commitment Period to allow for unforeseen delays in obtaining the occupation certificate etc., from the DTCP under the Act, in

		respect of the IREO-Victory Valley Project. **(emphasis supplied)**
16.	Due date of delivery of possession	29.11.2013 **Calculated from date of approval of building plan.**
17.	Occupation Certificate	28.09.2017 (annexure- R16 on page no. 59 of the reply.)
18.	Offer of possession	11.12.2017 (Page no. 82 of the complaint)
19.	Period of delay in handing over possession till offer of possession plus 2 months i.e.,	4 years 2 months 13 days
20.	Grace period utilisation	Grace period of 180 days is not allowed.

B. Facts of the complaint

The complainants have submitted as under: -

3. That the complainants are law-abiding citizen and consumer who have been cheated by the malpractices adopted by the respondent is stated to be a builder and is allegedly carrying out real estate development. Since many years, the complainants being interested in the project because it was a housing project and the complainants had needed an own home for their family.

4. That the respondent company under the guise of being a reputed builder and developer has perfected a system through

organized tools and techniques to cheat and defraud the unsuspecting, innocent, and gullible public at large. The respondent advertised its projects extensively through advertisements. The complainants were allured by an enamoured advertisement of the respondent and believing the plain words of respondent in utter good faith the complainants were duped of their hard-earned monies which they saved from bonafide resources.

5. That one-sided development agreement and inordinate delay in possession has been one of the core concerns of home buyers. The terms of the agreement are non-negotiable and buyers even if they do not agree to a term, there are no option of modifying it or even deliberating it with the builder. This aspect has often been unfairly exploited by the builder, whereby the builder imposes unfair and discriminatory terms and conditions. That the complainants were subjected to unethical trade practice as well as subject of harassment, buyer's agreement clause of escalation cost, many hidden charges which was forcedly imposed on buyer at the time of possession as tactics and practice used by builder under guise of a biased, arbitrary and discriminatory ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs UOI and Ors*** **(W.P 2737 of 2017).**

6. That due to the malafide intentions of the respondent and non-delivery of the apartment, the complainants have accrued huge losses on account of the career plans of their children and himself and the future of the complainants and their family are

rendered dark as the planning with which the complainants invested their hard earned monies have resulted in sub-zero results and borne thorns instead of bearing fruits. After passing 10 years of booking complainants weren't got possession of property.

7. That the complainants approached to the respondent initially for booking of a apartment admeasuring 2831 sq. ft. in the project "Ireo Victory Valley " situated in Golf Course Extension Road , sector 67, Gurugram, Haryana and paid the booking amount of Rs. 1565850/- through draft/cheque no.702995 dated 06.08.2010.

8. That the complainants were allotted the apartment no. VV-D17-0102, type 4BHK, first floor , tower D17 ,admeasuring 2831 sq. ft. in the subject project on dated 17.08.2010 .

9. That the respondent to dupe the complainants in their nefarious net even executed buyer's agreement signed between Mrs Sangita Khurana & Mr Rajnish Khurana and M/s Ireo Victory Valley Pvt Ltd on 21.03.2011. The respondent created a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants.

10. That the total cost of the said apartment is Rs. 18263863.72/- out of which sum of Rs 18011504/- was paid by the complainants in time bound manner.

11. That it is pertinent to mention here that according to the statement the complainants paid a sum of Rs 18011504/- to the respondent till date and only last instalment is remained as per the payment schedule and paid amount was demanded by the respondent without doing appropriate work on the said project even after extracting more than 95% amount which is illegal and arbitrary.

12. That respondent sent the demand note dated 28.12.2010 which was due on completion on excavation so approval of building plan date should be on 28.12.2010 or before 28.12.2010.

13. That respondent was liable to hand over the possession of the subject unit before 28.12.2013 so far from completion as per apartment buyer's agreement clause no 13.3 "*13.3 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 the Allottee 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 , and also subject to the Allotee having complied with all formalities or*

documentation as prescribed by the company , the Company proposes to hand over the possession of the said Apartment to the Allottee within a period of 36 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") after the expiry of the said commitment period to allow for unforeseen delays in obtaining the Occupation certificate etc. from DTCP under the Act in respect of the IREO-Victory Valley project .

14. That respondent was liable to hand over the possession of the said unit before 28.12.2013, which were so far from completion on this date. The respondent/builder sent the notice of possession on 11.12.2017 without getting occupancy certificate, after that the respondent/builder again sent possession letter on 16.09.2020 but flat are not in habitable condition.

15. That the respondent sent the notice of possession on 11.12.2017 and 16.10.2020 after which the complainants approached to the respondent for physical possession. After long pursual with respondent, he replied to the complainants that he is unable to complete the finishing work which was required to be done in the apartment.

16. That the builder in last 10 years had many times made false promises for possession of apartment and current status of project is still desolated and work is in-complete. The builder breached the trust and agreement. That as per section 19 (6) of the Act of 2016, the complainants have fulfilled their responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainants herein are not in breach of any of its terms of the agreement.

17. That respondent executed ABA is one sided at the time of offer of possession builder used new trick for extracting extra money from complainants. It is understood when respondent booked the flat in 2010 and which was to be delivered by 2013 (as per agreement it was to be delivered after 36 months from date approval of building plan) and therefore it is understood inflation was calculated at the time of booking. If project is delayed by the respondent, complainants are not responsible. When we see inflation index of past 18 year during this period rate of inflation has decreased so builder is liable to give discount in basic sale price rather than forcibly imposing escalation cost with unjustified reason, so demand of escalation cost is totally illegal, arbitrary, unjustified and unacceptable.

18. That the respondent has charged interest on delayed instalment @ 15 % per annum with quarterly interest as per clause 7.3 of ABA and offer the delay penalty for himself is just Rs 7.5/- per sq. ft per month as per clause no 13.4 is totally illegal arbitrary and unilateral.

19. That the respondent has indulged in all kinds of tricks and blatant illegality in booking and drafting of ABA with a malicious and fraudulent intention and caused deliberate and intentional huge mental and physical harassment of the complainants and their family has been rudely and cruelly dashed the savoured dreams, hopes and expectations of the complainant to the ground and the complainants are eminently justified in seeking possession of Apartment along with delayed penalty.

20. That the respondent offers the possession without giving delay interest for approx. 7 yrs. delay possession and it has created an extra burden on complainants which have been objected by the complainants at the time of offer of possession. It is unjustified and illegal.

21. That keeping in view the snail-paced work at the construction site and half-hearted promises of the respondent, and trick of extract more and more money from the complainants' pocket seems and that the same is evident from the irresponsible and

desultory attitude and conduct of the respondent, consequently injuring the interest of the buyers including the complainants who have spent her entire hard earned savings in order to buy this home and stands at a crossroads to nowhere. The inconsistent and lethargic manner, in which the respondent conducted its business and their lack of commitment in completing the project on time, has caused the complainants great financial and emotional loss.

22. That due to the malafide intentions of the respondent and non-delivery of the flat unit the complainants have accrued huge losses on account of the career plans of their family member and themselves and the future of the complainants and their family are rendered in dark as the planning with which the complainants invested her hard-earned monies have resulted in sub-zero results and borne thorns instead of bearing fare ruts

23. That the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the apartment which is the subject matter of this complaint is situated in sector 67, Gurugram which is within the jurisdiction of this authority.

C. Relief sought by the complainants:

24. The complainants have sought the following relief(s)

- To pass an order for delay interest on paid amount of Rs.18011504/- from 28.12.2013 along with pendent lite and future interest till actual possession thereon @15 %.
- To direct the respondent to complete all amenities which mentioned in brochure.
- To direct the respondent to quash the one-sided clauses from apartment buyer's agreement.

25. On the date of hearing, the Authority explained to the respondent/allottees 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.

D. Reply by the respondent

26. The respondent has contested the complaint on the following grounds.

I. That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in providing the best services to their customers. The respondent has developed and delivered several prestigious projects such as 'Grand Arch', 'Ireo City', 'Skyon', 'Uptown', Ireo City Central etc. In most of these projects large number of families have already been shifted after having taken possession and resident welfare associations have been formed which are taking care of the day

to day needs of the allottees of the respective projects.

II. That the complainants, after checking the veracity of the said project had applied for allotment of an apartment vide its booking application form dated 30.07.2010. Based on the said application, the respondent vide its allotment offer letter dated 15.09.2010 allotted to the complainants apartment no. B1004, tower no. B, having tentative super area of 3132 sq.ft. Accordingly, an apartment buyer's agreement was executed between the parties to the complaint on 31.12.2010 for a sale consideration of Rs.2,15,40,703.84/-. However, it is submitted that the amount towards the sale consideration 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 respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.

III. That the complainants were a continuous defaulter from the very inception. It is submitted that the respondent had raised the payment demand

towards the first instalment vide payment request dated 16.09.2010. However, the due amount was credited from the complainants only after reminders dated 21.10.2010 and 12.11.2010 were issued by the respondent.

IV. That vide payment request letter dated 24.12.2010, the respondent sent the payment demand towards the second instalment for the net payable amount of Rs. 20,92,047/-. However, the same was paid by the complainants only after reminders dated 02.02.2011 and 22.02.2011 were issued by the respondent.

V. That vide payment request letter dated 03.10.2012, the respondent sent the sixth instalment demand for the net payable amount of Rs.15,84,259.28/-. However, the complainants remitted the due amount only after a reminder dated 29.10.2012 was sent by the respondent.

VI. That vide payment request letter dated 26.09.2013, the respondent sent the ninth instalment demand for the net payable amount of Rs.15,62,389.66/-. However, the complainants remitted the due amount only after reminders dated 22.10.2013, 12.11.2013 and final notice dated 09.12.2013 were sent by the respondent.

VII. That vide payment request letter dated 24.02.2014, the respondent sent the tenth instalment demand for the net payable amount of Rs.15,50,983.91/-. However, the complainants remitted the due amount only after reminders dated 25.03.2014 and 14.04.2014 were sent by the respondent.

VIII. That vide payment request letter dated 23.01.2015, the respondent sent the eleventh instalment demand for the net payable amount of Rs.15,50,984.16/-. However, the complainants remitted the due amount only after reminders dated 18.02.2015, 11.03.2015 and final notice dated 01.04.2015 were sent by the respondent.

IX. That vide payment request letter dated 10.03.2016, the respondent sent the twelfth instalment demand for the net payable amount of Rs.15,60,585.57/-. However, the complainants remitted the due amount only after reminders dated 08.04.2016 and 02.05.2016 were sent by the respondent.

X. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the apartment buyer's agreement. It is submitted that clause 13.3 of the said agreement and clause 35 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 36 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 be additionally be entitled to a period of 180 days (Grace Period) ...".. Furthermore, the complainants 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.

XI. That from the aforesaid terms of the apartment buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction cannot be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in sub- clause (v) of clause 17 of the approval of building plan dated 29.11.2010 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the

construction of the project. It is submitted that the environment clearance for construction of the said project was granted on 25.11.2010. Furthermore, in clause (v) of part-b of the environment clearance dated 25.11.2010 it was stated that approval from fire department was necessary prior to the construction of the project.

XII. That it is submitted that the last of the statutory approvals which forms a part of the pre-conditions was the fire scheme approval which was obtained on 28.10.2013 and that the time period for offering the possession, according to the agreed terms of the apartment buyer's agreement, expired only on 28.04.2018. The respondent completed the construction of the tower in which the unit allotted to the complainants is located. It is pertinent to mention herein that the respondent had already received the occupation certificate dated 28.09.2017.

XIII. That, furthermore, the respondent offered the possession of the unit to the complainants vide notice of possession dated 14.11.2017 and intimated it to make the payment towards the balance amount of Rs. 50,74,080/-. The complainants were bound to take the possession of the unit after making payment of the due amount

and completing the documentation formalities as the 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. However, despite reminders dated 21.12.2017 and 15.01.2018 and final notice dated 26.02.2018, the complainants had remitted only a part of the total demanded amount and was bound to make payment towards the remaining amount along with holding charges and take the possession of the allotted unit.

XIV. That it is submitted that the complainants are real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market and the complainants now wants to harass and pressurize the respondent to submit to its unreasonable demands on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed. The complainants furthermore is also liable to make payment towards the holding charges on account of the delay in taking over the possession as per the terms of the allotment even after a notice of

possession has been issued by the respondent to the complainants.

27. 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.

E. Jurisdiction of the authority

28. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

29. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

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 Maintainability of the complant.

30. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as the respondent has not violated any provision of the Act.

31. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not

handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

32. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainants and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

33. 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 will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has

been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** 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...*
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> *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."*

34. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and*

unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

35. 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.

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

36. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

"34. Dispute Resolution by Arbitration

"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed

by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

37. 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.

38. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
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> ...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

39. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC 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 relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick

remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

40. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings regarding relief sought by the complainants.

Delay possession charges: To direct the respondent to give the delayed possession interest @15% to the complainants on paid amount of Rs 18011504/- from 28.12.2013 till actual possession.

41. In the present complaint, the complainants intends to continue with the project and is seeking delay possession charges at prescribed rate of interest on amount already paid by him as provided under the proviso to section 18(1) of the Act which reads as under: -

*"**Section 18: - Return of amount and compensation***

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the

handing over of the possession, at such rate as may be prescribed."

42. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 21.03.2011, provides for handing over possession and the same is reproduced below:

13. Possession and Holding charges

*"**13.3** Subject to Force Majeure, as defined herein and further subject to the Allottees having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees within a period of 36 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("**Commitment Period**"). The Allottees further agrees and understands that the company shall additionally be entitled to a period of 180 days ("**Grace Period**"), after the expiry of the said Commitment Period to allow for unforeseen delays in obtaining the occupation certificate etc., from the DTCP under the Act, in respect of the IREO- Victory Valley Project.*

43. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder(s)/promoter(s) and buyer(s)/allottee(s) 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(s) and buyer(s) 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 promoter(s)/developer(s) 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.

44. 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. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

45. 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 in obtaining the occupation certificate etc. from the DTCP under the Act.

46. Further, in the present case it is submitted by the respondent promoter that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 28.10.2013, as it is the last of the statutory approvals which forms a part of the preconditions. The authority in the present case observed 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. The respondent has

acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 31.07.2010 and the apartment buyer's agreement was executed between the respondent and the complainants on 20.09.2010. The date of approval of building plan was 29.11.2010. It will lead to a logical conclusion that that the respondent would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the agreement reproduced above it becomes 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.

47. **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 obtaining the occupation certificate etc. from the DTCP under the act, in respect of the said project. As a matter of fact, there is no document that has been placed on record which shows that the promoter has applied for occupation certificate within the time limit prescribed by the promoter (i.e., on or before 29.11.2013) in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

48. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 15% p.a. 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.*

49. 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. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka** observed as under: -

> *"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum*

compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

50. 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 is 7.30% per annum. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e.,9.30 % per annum.

51. 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;"

52. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% per annum by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

53. 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 11.12.2017, 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. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking

possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 29.11.2013 till the expiry of 2 months from the date of offer of possession i.e., 11.12.2017 which comes out to be 11.02.2018 as per the provisions of section 19(10) of the Act.

54. 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 21.03.2011, 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 along with grace period of 180 days which is not allowed in the present case. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainants to the respondent from the due date of possession i.e., 29.11.2013 till offer of possession of the booked unit i.e., 11.12.2017 plus two months which comes out to be 11.02.2018 as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority: -

55. 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 function entrusted to the authority under sec 34(f) of the Act:-

i. The respondent is directed to pay the interest at the prescribed rate i.e., 9.30 % 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 the offer of possession i.e., 11.12.2017 plus two months which comes out to be 11.02.2018 as per section 19 (10) of the Act.

ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement. However, holding charges shall also not be charged by

the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

56. Complaint stands disposed of.

57. File be consigned to the registry.

Samir Kumar
(Member)

V.K Goyal
(Member)

Haryana Real Estate Regulatory Authority, Gurugram
Dated:06.10.2021

JUDGEMENT UPLOADED ON 28.12.2021