BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1918 of 2021**
First date of hearing:		**09.07.2021**
Date of decision	**:**	**06.10.2021**

Chandan Khaitan
R/O: Flat No. 1103, 16th Tower, The Close - North, Nirvana Country South City II, Gurugram-122002 **Complainant**

Versus

1.Ireo Victory Valley Private Limited
Regd. Office at: - 5th Floor, Orchid Centre, Golf Course Road, Sector 53, Gurugram-122002, Haryana **Respondent**

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

APPEARANCE:
Shri Abhay Jain Advocate for the complainant
Shri M.K Dang Advocate for the respondent

ORDER

1. The present complaint dated 19.04.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No	Heads	Information
1.	Name of the project	"The Victory Valley", Sector-67, Gurgaon
2.	Licensed area	24.6125 acres
3.	Nature of the project	Group Housing Complex
4.	DTCP license no.	244 of 2007 dated 26.10.2007
	License valid upto	25.10.2017
		KSS properties Pvt. Ltd. and High responsible realtors Pvt. Ltd.
5.	RERA registered/not registered	Not Registered
6.	Date of approval of building plan	29.11.2010 (Page no. 98 of the reply)
7.	Unit no.	B0104, 1st floor, Tower B (Page no. 39 of the complaint)
8.	Unit measuring	3084 sq. ft. (Page no. 39 of the complaint)

9.	Booking date	21.12.2010 [Page 36 of reply]
10.	Date of allotment	10.01.2011 [Page 52 of reply]
11.	Date of execution of Flat buyer's agreement	06.07.2011 [Page 36 of complaint]
12.	Payment Plan	Instalment payment plan (Page no. 67 of the complaint)
13.	Total consideration	Rs. 2,40,18,040/- [vide statement of account on page 118 of reply]
14.	Total amount paid by the complainant	Rs. 2,10,00,785/- [vide statement of account on page 118 of reply]
15.	Due date of delivery of possession as per clause 13.3	**29.11.2013** (**Note:** - Grace period is not allowed)
16.	Offer of possession	Offered on 13.06.2018 [page no. 116 of reply]
17.	Occupation certificate	28.09.2017 [page no. 115 of reply]
18.	Delay in handing over possession till the date of offer of possession plus 2 months i.e., 13.08.2018	4 years, 8 months, 15 days

B. Facts of the complaint

3. That the respondent published very attractive brochure highlighting the project, victory valley at sector 67, Gurugram, Haryana. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country in order to lure prospective customers to buy apartment in the project.

4. That the original allottees, Mr Avnish Arora and Mrs Ritu Arora were approached by the representatives of the developer. The sale representatives claimed the project as the world class project and ultimately, they booked the flat on 04 January 2011.

5. That the respondent allotted apartment no. VV-B-01-04, first floor, tower-B, having a super area of 3084 square feet with two car parking slots in the project Victory Valley at sector 67, Gurugram, Haryana dated 10 January 2011 for a total sale consideration of Rs.2,18,91,672/- including EDC, IDC, two Parking slots, club charges, replacement fund maintenance security, labour cess, applicable carrying cost, etc.

6. That the apartment buyer's agreement was executed between the parties for apartment no. VV-B-01-04, first floor, tower-B, having a super area of 3084 square feet with two car parking slots in the project Victory Valley at sector 67, Gurugram, Haryana on 06 July 2011.

7. That the complainant Chandan Khaitan bought the apartment from the original allottees, Mr Avnish Arora and Mrs Ritu Arora on 18 November 2014, which was approved and endorsed by the developer. At the time of endorsement, the complainant was told by the respondent that the complainant would get the possession of his apartment shortly.

8. That the complainant paid Rs.13,83,000/- for stamp duty charges, legal charges and other miscellaneous charges for executing the conveyance deed on 06 July 2018, but till date, no conveyance deed has been executed by the developer, in the

favour of the complainant despite taking full amount for the conveyance deed.

9. That the respondent, issued offer for possession letter on 31 December 2018. The complainant took the possession of the apartment on 31 December 2018.

10. That the respondent was duty bound to execute the conveyance deed in favour of the complainant but till date the respondent has failed to execute the conveyance deed for the apartment.

11. That after a delay of more than two years and nine months after receiving the total consideration and stamp duty charges, the respondent has failed to execute the conveyance deed for the apartment, bought by the complainant. The complainant approached the respondent many times and pleaded for execution of conveyance deed for his apartment as per the commitments in the apartment buyer's agreement.

12. That the respondent has not paid the delay possession charges to the complainant since 06 January 2015, the actual legal date of possession.

C. Relief sought by the complainant:

13. The complainant has sought the following relief:

(i) Direct the respondent to pay interest for every month of delay in offering the possession of the apartment.

(ii) Direct the respondent to execute a conveyance deed for the apartment.

14. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

15. That the apartment buyer agreement was executed between the complainant and the respondent prior to the enactment of the Act of 2016.

16. That this hon'ble authority does not have the jurisdiction to try and decide the present false and frivolous complaint. That the project in question is exempted from registration under the Act of 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017. The tower of the project where the unit of the complainant is situated does not come under the scope and ambit of 'on-going project' as defined in section 2(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017.

17. That the complaint is not maintainable because the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 34 of the buyer's agreement.

18. That the complainant has not approached this hon'ble authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint.

    - That the respondent is a reputed real estate developer having immense goodwill and has always believed in

satisfaction of their customers. The respondent and its associate companies have developed and delivered several prestigious projects such as 'Grand Arch', 'Skyon', 'Uptown', 'Gurgaon Hills', 'The Corridors' etc. and in most of these projects large number of families have already 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.

- That the original allottees i.e., Avnish Arora and Ritu Arora, after checking the veracity of the project namely, 'Ireo Victory Valley', Gurugram had applied for allotment of an apartment vide their booking application form dated 04.01.2011.
- That based on the said application, the respondent vide its allotment offer letter dated 10.01.2011 allotted to the original allottees apartment no. B0104, tower no. B, having tentative super area of 3084 sq.ft for a sale consideration of Rs. 2,14,75,506.08. However, it is submitted that sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the original complainant at the applicable stage. Accordingly, an apartment buyer's agreement was executed between the original allottees with the respondent on 06.07.2011. It is further submitted that when the original allottees 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.

- That the original allottees made certain payments towards the instalment demands on time and as per the terms of the allotment. However, they committed defaults in subsequent instalments. It is submitted that the respondent had raised the payment demand towards the ninth instalment vide payment request dated 26.09.2013. However, the due amount was received from the original allottees only after reminder dated 22.10.2013 was sent by the respondent.
- That vide Payment request dated 24.02.2014, the respondent had raised the demand of tenth instalment for net payable amount of Rs. 15,03,226.55. However, the original allottees made the payment only after reminders dated 25.03.2014, 14.04.2014 and final notice dated 03.05.2014 were sent by the respondent.
- That the original allottees and the complainant thereafter signed the nomination/transfer agreement on 18.11.2014 and submitted the same to the respondent wherein the complainant admitted that all rights, title and interest of the original allottees would vest with him, and he shall enjoy the same subject to the obligations in the agreement. The complainant had vide clauses 7 and 8 of the said nomination agreement

admitted that he would forego and waive his right to receive any compensation for delay in handing over the possession or any rebate from the respondent and to that extent the apartment buyer's agreement would stand modified. The complainant had also addressed a letter dated 18.11.2014 to the respondent wherein he had acknowledged that he would be bound by all the terms and conditions of the respondent including the terms and conditions of the agreement. The complainant had also submitted an affidavit dated 18.11.2014 wherein he had again acknowledged vide clause 4 that they would waive and forego the right to receive compensation for delay in handing over the possession and to that extent the apartment buyer agreement would stand modified. The same undertaking was again given by the complainant vide clause 1 of the indemnity bond cum undertaking dated 18.11.2014. The respondent had after scrutiny of the application as well as of the documents, vide letter dated 21.11.2014 assigned all the rights of the original allottees to the complainant and all the documents were endorsed in the name of the complainant.

- That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 13.3 of the buyer's agreement and clause 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 complainant had further agreed for an extended delay period of 12 months from the date of expiry of the grace period as per clause 13.5 of the apartment buyer's agreement.

- That from the aforesaid terms of the 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 can't be raised in the absence of the necessary approvals. 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. 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.

- 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 buyer's agreement, expired only on 28.04.2018. The respondent completed the construction of the tower in which the unit allotted to the complainant. The respondent received the occupation certificate on 28.09.2017.
- That the respondent offered the possession of the unit to the complainant vide notice of possession dated 13.06.2018 and intimated him to complete the documentation formalities and make the payment towards the outstanding amount
- That the complainant after making complete payment have been put in possession of the said apartment vide possession letter dated 31.12.2018. The complainant had conducted his own investigations and was provided with all clarifications and information regarding the project. The complainant had taken the possession of the apartment after having inspected and after being fully satisfied.

E. Jurisdiction of the authority

19. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

21. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent

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

23. 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 complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

24. 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."*

25. 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."

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

27. 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".

28. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the apartment 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.

29. 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 complainant 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."*
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> *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.

...

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 Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

30. 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."

31. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is 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 on the relief sought by the complainant.

I. Direct the respondent to pay interest for every month of delay in offering the possession of the apartment.

II. Direct the respondent to execute a conveyance deed for the apartment.

G.I Direct the respondent to pay interest for every month of delay in offering the possession of the apartment.

32. In the present complaint, the complainant intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso 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."

33. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 06.07.2011 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.*

34. 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 promoter/developer. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.

35. 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 complainant 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 dotted lines.

36. 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.

37. 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 approval of building plans which was obtained on 29.11.2010, 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 complainant/allottee. 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 complainant on 21.12.2010 and the apartment buyer's agreement was executed between the respondent and the complainant on 06.07.2011. The date of approval of building plan was 29.11.2010. It will lead to a logical conclusion 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 allottee must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainant.

38. **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.

39. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% 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.*

40. 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.

41. 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 06.10.2021 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.

42. 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;"*

43. Therefore, interest on the delay payments from the complainant 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 complainant in case of delay possession charges.

G.II Direct the respondent to execute conveyance deed for the apartment bought by complainant.

44. In the present case, the complainant was offered possession by the respondent on 13.06.2018 after receipt of OC dated 28.09.2017. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted apartment to the complainant as per

the conditions of the buyer's agreement dated 06.07.2011 executed between the parties.

45. It is observed that proviso to clause 14 of the buyer's agreement dated 06.07.2011 provides for execution of conveyance deed in favour of an allotee within reasonable time. The relevant clause of the buyer's agreement reads under:

> *"The Company along with the Confirming Parties shall prepare and execute a conveyance deed to convey the title of the said apartment in favour of the Allottee."*

46. Since the developer do not mention any specific time period for executing the conveyance deed in the BBA nor has mentioned in the offer of possession therefore this reasonable time would mean same as mentioned in, proviso to Section 17(1) of the Act i.e., 3 months from the date of issue of occupancy certificate. The proviso to section 17(1) is produced as under:

> *"..... Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried. out by the promoter within three months from date of issue of occupancy certificate. ....."*

47. 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 section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 13.3 of apartment buyer's agreement executed between the parties on 06.07.2011, 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 complainant is 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 complainant to the respondent till offer of possession of the booked unit i.e., 13.06.2018 plus two months which comes out to be 13.08.2018 at prescribed rate of interest i.e., 9.30% p.a. as per the provisions of section 18(1) of the Act read with Rule 15 of the rules.

H. Directions of the authority

48. Hence, the authority hereby passes this order and issues 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 section 34(f):

i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 29.11.2013 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority (13.06.2018) plus two months i.e., 13.08.2018 as per section 19 (10) of the Act.

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

iii. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.

iv. The respondent shall not charge anything from the complainant which is not part of the builder buyer agreement.

v. The respondent shall execute the conveyance deed within 3 months of this order upon payment of requisite stamp duty as per the norms of the state government.

49. Complaint stands disposed of.

50. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 06.10.2021

Judgement uploaded on 18.02.2022.